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Supreme Court of the United States

OCTOBER TERM, 1952

No. 296

ALSTATE CONSTRUCTION COMPANY,
PETITIONER,

vs.

MAURICE J. TOBIN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED AUGUST 27, 1952

CERTIORARI GRANTED DECEMBER 8, 1952

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the United States District Court for the Middle District of Pennsylvania	a	1
Complaint	a	1
Answer	e	4
Proceedings in the United States Court of Appeals for the Third Circuit	1	5
Appendix to Appellant's brief	1	5
Docket entries	1	5
Opinion, Follmer, J.	4	7
Motion for reargument and reconsideration	15	15
Judgment	19	18
Appendix to Appellee's brief	21	19
Stipulation determining certain pertinent facts	21	19
Supplemental stipulation determining certain pertinent facts	32	27
Extracts from transcript of testimony	35	29
Appearances	35	29
Testimony of Charles H. Eichenberg	35	29
Pierce A. Kraemes	42	34
John S. Niodna	48	38
John W. Grenoble	58	47
Extracts from interpretative bulletin	65	52
Pertinent statutory provisions	71	56

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 19, 1952.

—5474

	Original	Print
Petition for supersedeas pending appeal	82	62
Order granting supersedeas	84	64
Stipulation for extension of time for filing brief	85	65
Opinion, Kalodner, J.	86	66
Judgment	91	71
Petition for rehearing	92	72
Order denying petition for rehearing	92	72
Mandate	92	72
Order authorizing Clerk to transmit certain papers	94	74
Clerk's certificate (omitted in printing)	94	
Order extending time to file certiorari	94	74
Order granting certiorari	95	75

[fol. a]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM R. MCCOMB, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff

v.

ALSTATE CONSTRUCTION COMPANY, Defendant

COMPLAINT—Filed June 18, 1948

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201, *et seq.*), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant is, and at all times since April 1, 1946, was, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, having its principal office and place of business at 313 Chestnut Street, Harrisburg, Dauphin County, Pennsylvania, and branch establishments located at R. D. #3, Hanover, Adams County, Pennsylvania; at Sillyman Street, Cressona, Schuylkill County, Pennsylvania, and at Negany, Mifflin County, Pennsylvania, each within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, [fol. b] engaged in the production, sale, distribution and further application of bituminous concrete materials for use by interstate railroads and other industrial, commercial, and private customers and for use in the construction, reconstruction, repair, and maintenance of interstate highways and other instrumentalities of interstate commerce for and by the Commonwealth of Pennsylvania and numerous political subdivisions thereof.

IV

At all times hereinafter mentioned, defendant employed and is employing approximately 38 employees in the aforesaid places of business where they are engaged in interstate commerce and in the production of goods for interstate commerce as described in paragraph III hereof and in processes or occupations necessary to such production. All of the duties performed by said employees are necessary and essential to the operation and maintenance of essential instrumentalities of interstate commerce and are an essential and integral part of interstate commerce.

V

Defendant has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many of its employees in interstate commerce and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty (40) hours since October 24, 1940, without compensating these employees for their employment in excess of forty (40) hours, in workweeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pur- [fol. c] suant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act, in that since

October 24, 1945, it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek with respect to many of its employees.

VIII

Defendant has, since the effective date thereof, repeatedly violated and is continuing to violate the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment preliminarily during the pendency of this action and permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, [fol. d] from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

William S. Tyson, Solicitor, Ernest N. Votaw, Regional Attorney, Louis Weiner, Senior Attorney, United States Department of Labor.

Post Office Address: c/o Solicitor of Labor, U. S. Department of Labor, 1216 Widener Building, Philadelphia 7, Pennsylvania, or c/o United States Attorney, Room 424, Post Office Building, Scranton, Pennsylvania, or c/o Solicitor of Labor, U. S. Department of Labor, Washington 25, D. C.

[fol. e] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted]

DEFENDANT'S ANSWER—Filed July 16, 1948

Alstate Construction Comany, the defendant in the above civil action, in answer to the specific averments of the complaint, sets forth:

1. Defendant, for the reasons hereinafter stated, denies that the District Court has jurisdiction over the action.

2. Defendant denies that any of its employees are engaged in interstate commerce or in the production of goods for interstate commerce, or that they are so closely connected with commerce or transportation as to be a part of it within the meaning of the Act.

3. Defendant denies that its operations are as set forth in paragraph III of the complaint, and, on the other hand, avers that it is engaged solely in the production and sale of bituminous concrete materials in intrastate commerce.

4. Defendant denies that it has violated or is violating the provisions of Sections 7 and 15(a)(2) of the Fair Labor Standards Act of 1938 (act of June 25, 1938, see 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201, et seq., hereinafter called the Act) for the reason that its em- [fol. f] ployees are engaged neither in interstate commerce nor in the production of goods for interstate commerce.

5. Defendant denies that it has violated or is violating the provisions of Section 11(c) and 15(a)(5) of the Act by failing to make, keep and preserve certain records, as alleged by the complainant, for the reason that it is not subject to the provisions of said Act.

6. Defendant denies that it has violated or is continuing to violate any provision of said Act, and alleges that its employees are engaged solely in intrastate commerce and neither the defendant nor its employees are in any way subject to the provisions of said Act.

7. Defendant specifically denies the allegations contained in paragraphs II, III, IV, V, VII and VIII of the complaint.

Wherefore, defendant prays that complainants request for a judgment preliminarily during the pendency of this action and permanently thereafter be denied.

Gilbert Nurick, State Street Building, Harrisburg, Pa., Samuel A. Schreckengaust, Jr., State Street Building, Harrisburg, Pa., McNees, Wallace & Nurick, State Street Building, Harrisburg, Pa., Attorneys for Defendant.

[fol. 1] IN UNITED STATES DISTRICT COURT

Appendix to Appellant's Brief

I

Docket Entries

1948

June 18, Complaint.

June 18, Motion for a preliminary injunction.

June 18, Order that the defendant Alstate Construction Company show cause on the 16th day of July, 1948, at Harrisburg, Pa., if any it can, why a preliminary injunction should not issue. ( ) Copy of complaint, summons and copy, copy of motion and order handed U. S. Marshal.

June 18, J. S. 5.

June 22, Summons returned served 6-21-48, also copy of complaint, motion and Rule to Show Cause. (M. F. & E. $2.26.)

July 16, Answer of defendant.

Dec. 2, Praecipe to place case on trial list for the January Term 1949, at Lewisburg, Pa.

1949

Jan. 17, Stipulation of counsel determining certain pertinent facts.

Jan. 17, Pre-Trial conference.

Jan. 17, Order continuing case to 2-21-49, at 10:00 a. m., at Harrisburg- Pa. (F.) Copies mailed counsel of record.

[fol. 2] Feb. 8, Order continuing case to March 1, 1949,

1949

10:00 a. m., at Harrisburg, Pa. (F.) Copies mailed counsel of record.

Mar. 1, Clerk's minutes, case continued after the taking of some additional testimony.

Mar. 15, Supplemental Stipulation of counsel determining certain pertinent facts.

Mar. 29, Plaintiff's exhibits 1 and 3.

June 14, Order directing transcript of hearings be filed. (F.)

June 14, Transcript of March 1, 1949. Filed.

Oct. 22, Praecipe to place case on the Trial List for the November Term 1949, at Harrisburg, Pa.

Nov. 28, Order continuing case to Thursday, Dec. 15, 1949, at 11:00 a. m., at Lewisburg, Pa. (F. V. F.) Copies of above order mailed to counsel of record.

Dec. 13, Plaintiff's requests for Findings of Fact and Conclusions of Law.

Dec. 15, Clerk's minutes of Arguments before Judge Follmer.

1950

June 7, Stipulation of counsel that Maurice J. Tobin, Sec. of Labor, be substituted as party plaintiff, and Order allowing substitution of party plaintiff. (M.) Copies of order mailed counsel of record.

Aug. 25, Copy of clerk's letter advising counsel that additional arguments will be heard 9-12-50 at Harrisburg, Pa., at 10:00 a. m.

Sept. 12, Clerk's Minute sheet of further arguments before Judge Follmer. Decision to be handed down.

[fol. 3] Sept. 12, Defendant's requests for Findings of Fact and Conclusions of Law.

1951

Feb. 6, Additional stipulation determining certain pertinent facts.

Feb. 23, Opinion—the plaintiff is entitled to an injunction as prayed for. (F.) Copies of opinion mailed counsel of record, and the Attorney General.

Feb. 28, Motion for re-argument and re-consideration.

1951

Feb. 28, Clerk's Minute Sheet of Argument on Motion for re-argument and re-consideration before Julge Follmer at Harrisburg, Penna.

Mar. 30, Order of Court that the Opinion as originally filed calls for no modification, defendant's motion for re-consideration is refused and Judgment in accordance with the Opinion filed 2-23-51, will be filed this date. (F.) Copies of Order filed this date, mailed to counsel of record.

Mar. 30, Judgment of a permanent injunction restraining defendant from violating the provisions of Section 16 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938. Copies of Judgment filed March 30, 1951, mailed counsel of record.

Mar. 30, J. S. 6.

Apr. 25, Notice of Appeal.

Apr. 25, Copies of Notice of Appeal mailed U. S. Court of Appeals and Counsel for Plaintiff.

Apr. 25, Check in the sum of $250.00 deposited in the Registry Fund in lieu of Appeal Bond (P. 930).

Apr. 27, Receipt for notice of appeal from U. S. Court of Appeals.

[fol. 4] IN UNITED STATES DISTRICT COURT

OPINION—Filed February 23, 1951

This action was brought by William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff, under the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat, 1060, 29 U. S. C. § 201, et seq.) to enjoin defendant, Alstate Construction Company, a Pennsylvania corporation, from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Act 29 U. S. C. § 215 (a) (2, 5). Subsequently, by Stipulation, Maurice J. Tobin, Secretary of the United States Department of Labor, was substituted as party plaintiff.

The facts of the case are contained in a Stipulation and Supplemental Stipulations of Facts, further supple-

mented by certain additional testimony taken in open court by the plaintiff, all of which may be summarized and condensed as follows:

Defendant is engaged in the production, sale, distribution and further application of a bituminous concrete material, known as amesite. Its operations are wholly in Pennsylvania, where its material is processed at its three seperate plants, namely, Hanover in Adams County, Cressona in Schuylkill County, and Naginey in Mifflin County. [fol. 5] Amesite consists of the following ingredients: limestone, naphtha, asphalt filler and lime, all of which is quarried or manufactured and purchased in Pennsylvania with the exception that about eight thousand gallons of asphalt are received from a refinery in Baltimore, Maryland, and pumped from railroad tank cars into defendant's storage tanks each week at the Hanover plant. The operation of receiving, handling and pumping the asphalt takes from four to five hours and is performed by any employee available at the time.

The said bituminous concrete materials, known also, as HE, a cold mix and ID2, a hot mix, otherwise known as macadam blacktop, are primarily marketed by defendant as follows:

(1) Contracts with the Commonwealth of Pennsylvania and many of its political subdivisions, for the sale of material and for material and labor for constructing, reconstructing, resurfacing or repairing highways, roads, and streets connecting with such highways, all of which are accessible to and regularly used by general vehicular traffic, including traffic moving between points in Pennsylvania and points in other states.

(2) Contracts with interstate railroad companies, commercial and industrial firms engaged in the production of goods for commerce for sale of material and for material and labor to be used in the construction, reconstruction, repair or maintenance of roads, railroad crossings, parking areas and other facilities of such firms.

[fol. 6] (3) Contracts with private persons and others having no interstate activity and not engaged in interstate commerce or the production of goods for commerce, for sale

of material and for material and labor to be used in construction, reconstruction, repair and maintenance of road surface.

The period covered by the inspection was from June 30, 1943, through June 30, 1948. For this period the total volume of business done by defendant was $1,172,276.70, as follows:

Cressona Plant, Total volume $643,334.84 distributed as follows:

Pennsylvania Department of Highways	53.96% or	$347,177.55
Townships	9.99% or	64,327.68
Boroughs	3.32% or	21,362.45
Industrial	13.23% or	85,135.69
Railroads	2.20% or	14,154.80
Private	17.26% or	111,176.67

Naginey Plant, Total volume $237,991.99 distributed as follows:

Pennsylvania Department of Highways	33.25% or	$ 79,154.63
Townships	9.76% or	23,232.06
Boroughs	22.56% or	53,710.41
Industrial	13.79% or	32,834.43
Railroads	.92% or	2,205.75
Private	19.68% or	46,854.71

[fol. 7] Hanover Plant, Total volume $29,949.87 distributed as follows:

Pennsylvania Department of Highways	76.95% or	$223,904.12
Townships	1.12% or	3,294.06
Boroughs	3.04% or	8,872.97
Industrial	13.29% or	38,692.18
Railroads	1.56% or	4,566.62
Private	3.99% or	11,629.92

Defendant employs various classes of employees in its three plants and main office, including plant foreman, field foreman, equipment operators, laborers, semi-skilled

laborers, truck drivers, mixers, firemen, watchmen, and clerks. Equipment operators are engaged in operating such equipment as spreaders, graders, pavers, shovels, and rollers at times used directly in the work of constructing, repairing, or reconstructing the said highways and roads. Truck drivers are engaged in the following activities:

(1) Haul stone from the Bethlehem, Pennsylvania, quarry to the Hanover plant for use in the production of bituminous concrete materials.

(2) Haul the bituminous concrete materials from the company's Naginey and Cressona plants to the job site.

(3) Haul the bituminous concrete materials from the company's Naginey and Cressona plants to the job sites where the material is dumped into spreaders or pavers on the highway for application thereon.

[fol. 8] (4) At the Hanover plant the defendant's truck drivers do some hauling of the bituminous concrete materials from the plant to the job site. Pennsylvania Department of Highways, in some instances, has accepted bids for the said material F. O. B. plant, in which event the material is hauled from the plant to the job in Pennsylvania Highway Department trucks. For the most part, however, the trucking is performed by contract haulers, hauling from the plant to the job site, at an agreed price per ton, which is paid by the defendant.

Laborers and semi-skilled laborers rake amesite on the highways, spread stone base and perform pick and shovel work on roads. At the plants off-the-road employees, including mixers, firemen, watchmen, and clerks are engaged in, or perform work incident to, the production of bituminous concrete materials.

Most of the employees of the defendant of the classes above described are regularly employed in excess of forty hours per week without payment of extra compensation at time and one-half of their regular rate for such overtime hours. Wages are paid throughout the year to many of defendant's employees, including months during which defendant's plants do not operate and the employees do not work.

Prior to January 1, 1948, defendant, at its main office and each of its plants, failed to keep proper records as re-

quired by Title 29, Chapter V, Code of Federal Regulations, Part 516. Since January 1, 1948, defendant has kept records showing occupation, day and time of beginning of work week, number of hours worked each day, and number [fol. 9] of hours worked each week.

There is no segregation of work performed by truck drivers at the Cressona or Naginey plants in the hauling of road mix produced at these plants for use on existing highways, public roads and streets from other hauling work performed by them; nor is there any segregation of work performed by the so-called off-the-road employees employed at the company's three plants engaged in the production of road mix for use on existing highways, public roads and streets from other uses for which the road mix is produced.

Plaintiff contends that employees of the defendant actually engaged in the construction, repair, reconstruction, extension and maintenance of interstate highways, public roads and interstate railroads which are regularly used for interstate transportation are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938; also, that employees engaged in manufacturing and hauling road mixes produced at defendant's plants for use on interstate highways are engaged "in the production of goods for commerce;" also, that truck drivers who haul raw materials or ingredients to defendant's plants producing road mixes for use on interstate highways are engaged "in the production of goods for commerce."

Defendant, while admitting that its employees actually working on the highway or other instrumentality of interstate commerce itself, applying amesite in the repair or maintenance thereof as distinguished from original construction, are within the protection of the Fair Labor [fol. 10] Standards Act, contends that its employees engaged in the construction of new highways and its off-the-road employees do not have such immediacy of participancy in interstate commerce as to bring them within the coverage of the said Act.

The parties are not in agreement as to what constitutes new construction in relation to road building. Plaintiff insists upon the ultimate, i.e., new means the construction

of a road on a location in which no previous road existed; defendant contends that it includes the complete remaking of an old road bed, which almost always includes the use of a substantial part of the original location but also involves the straightening of curves and the elimination of hills which would necessarily cover some virgin road territory.

The function of the court in this situation is clearly pointed out by Justice Frankfurter in A. B. Kirschbaum Co. v. Walling, 316 U. S. 517, 523, 524.

> "* * * the scope of the Act is not co-extensive with the limits of the power of Congress over commerce, * * *. * * * the Fair Labor Standards Act puts upon the courts the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations. * * *
>
> "* * * the provisions of the Act expressly make its application dependent upon the character of the employees' activities. * * *".

In Overstreet et al. v. North Shore Corp., 318 U. S. 125, 128, 63 S. Ct. 494, 496, 87 L. Ed. 656, the court said:

> [fol. 11] "* * * And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations."

Again in 10 East 40th Street Building, Inc. v. Callus et al., 325 U. S. 578, 582, 65 S. Ct. 1227, 1228, 89 L. Ed. 1806, 161 A. L. R. 1263, Justice Frankfurter said:

> "* * * For as was pointed out in Walling v. Jacksonville Paper Co., supra, at 570, we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

Original construction is definitely beyond the contemplation of the Act.[1] But what is original construction? As indicated above, plaintiff insists upon the ultimate, i.e., the construction of a road where no road has previously existed. Defendant contends that any resurfacing of an old road bed is new or original construction. In the Kirschbaum case, supra (316 U. S. 517, 520), Justice Frankfurter aptly phrased the inherent difficulty in properly applying the provisions of the Act to the average industrial enterprise as follows:

> "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is [fol. 12] as rewarding as an attempt to square the circle * * *."

However, in attempting to determine what constitutes "commerce" or "engaged in commerce" we are cautioned that we are to be guided by practical considerations.

This defendant, according to the Stipulations, makes, distributes and applies its road material, amesite; its road work, covered by contracts with the Commonwealth of Pennsylvania and many of its political subdivisions, involved no completely original construction, it consisted entirely in some form of resurfacing of previously existing roads, either interstate as such or connecting with an interstate system, with the slight exception involved in the straightening of old road lines; its industrial and railroad work was in each cited instance done for the improvement of the facilities of concerns engaged in interstate commerce; its private work comprised about fourteen and one-half percent of its overall total and apparently involved no interstate activity. Furthermore, at none of its plants was there any segregation of work performed by its off-the-road employees who were engaged in work having definite interstate involvements from those of a purely private nature.

Starting with the premise that approximately eighty-

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[1] Kelly v. Ford, Bacon & Davis, Inc. (3 Cir.) 162 F. 2d 555, 561.

five and one-half per cent of its total volume of work for the period in question involved interstate facilities, the sole question remaining is, Was it or was it not original construction? A typical case would be a through highway carrying a State and frequently a United States highway [fol. 13] number. It may originally have been dirt, but it was none the less a part of an interstate system of highways. Just what sort of treatment would the defendant have us designate original construction on that old road bed? What difference does it make whether the old dirt road bed has simply been oiled, stoned and oiled, cemented or amesited? It is still the improvement of a previously existing interstate highway.

In Walling v. McCready Const. Co. (D. C. W. D. Pa.) 60 F. Supp. 243, 248 (aff. 156 F. 2d 932), the court, in my judgment, correctly analyzed this road situation as follows:

> "* * * In most of the highways involved in this case, where defendant claims the work was new,—even though the road follows the old—it relies on the magnitude of the work, notwithstanding the work was on the old road. In such cases there is no doubt that the work done by defendant was repair or reconstruction of an instrumentality of interstate commerce. In some instances, parts of the highway were relocated following the general location of the old highway, and served the same purpose. In those cases we are of the opinion the work done by the employees falls squarely within the Act. In such instances, the work done was clearly to improve portions of a highway that was used in interstate commerce."

I am of the opinion that the various plants of the defendant were all component parts of an integrated unit, eighty-five and one-half per cent of whose total output was di- [fol. 14] rected toward the improvement of various interstate facilities, and that all of the employees of the defendant are definitely within the scope of the statute. As interpreted by the Supreme Court in Overstreet et al. v. North Shore Corp., 318 U. S. 125, 129,

> "We think that practical test should govern here. Vehicular roads and bridges are as indispensable to

the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce. Cf. Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 218. Those persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce' even as was the bolt-carrying employee in the Pedersen case, supra, because without their services these instrumentalities would not be open to the passage of goods and persons across state lines. And the same is true of operational employees whose work is just as closely related to the interstate movement * * *."

My conclusion is, therefore, on the whole of the transactions involved in this case, that the plaintiff is entitled to an injunction, as prayed for.

An order for judgment in accordance herewith may be submitted on notice to opposing counsel.

(s) Frederick V. Follmer; United States District Judge.

February 23, 1951.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION FOR RE-ARGUMENT AND RE-CONSIDERATION—Filed February 28, 1951

To the Honorable Frederick V. Follmer, Judge of said Court:

Alstate Construction Company, by its attorneys, McNees, Wallace and Nurick, moves your Honorable Court for Re-argument and Re-consideration of the above-captioned case and assigns in support thereof the following reasons:

1. The provisions of the Fair Labor Standards Act apply only to those employees who are engaged either "in

commerce" or "in the production of goods for commerce". Neither plaintiff nor defendant contended that any of the defendant's employees were engaged "in commerce"; plaintiff contended that they were engaged "in the production of goods for commerce", relying chiefly on the so-called "ice cases" while defendant contended that its employees, and particularly the "off-the-road" employees, did not have such immediacy of participancy in interstate commerce as to bring them within the coverage provisions of the Act. The Court, without determining that any of defendant's employees are engaged "in commerce" or "in the production of goods for commerce", holds:

[fol. 16] (1) That defendant's off-the-road employees are engaged in work having "definite interstate involvements",

(2) That a large percentage of the total volume of defendant's work "involved interstate facilities" and "was directed toward the improvement of various interstate facilities" and

(3) That "all of the employees of the defendant are definitely within the scope of the statute".

2. The Court's opinion fails to cite, distinguish or consider the line of cases dealing with the coverage of off-the-road employees as cited in defendant's brief including:

(a) McLeod v. Thelkred, 319 U. S. 491, 63 S. Ct. 1248 (which involved an off-the-road employee of an interstate railroad).

(b) Walling v. Craig, 55 F. Supp. 479 (which involved off-the-road employees who operate off-the-road bituminous plants).

(c) Schroeder Company, Inc. v. Clifton, 153 F. 2d 385 (which involved quarry workers quarrying rocks for use upon interstate transportation lines, both railroads and highways).

(d) Wiley v. Stewart Sand and Material Co., 206 S. W. 2d 362 (which involved employees who produced rock for use upon the highways and railroad beds within Missouri).

(e) Ramos v. Puerto Rico Cement Corporation, Civil Case No. 4583 (which involved employees who pro-

[fol. 17] duced cement which went into interstate instrumentalities).

(f) Crabb v. Welden Bros., 65 Fed. Supp. 369 (which involved employees engaged in cutting and hauling timber in connection with the Alcan highway).

(g) McComb v. Trimmer (1924), 85 F. Supp. 565 (which involved employees of a company quarrying and processing stone for use in repair and maintenance of interstate highways).

Defendant's off-the-road employees who work in its bituminous plants are in exactly the same position as the employees in each of the above cited cases where coverage was denied, and we know of no case to the contrary.

3. The Court's opinion states that "all of the employees of the defendant are definitely within the scope of the statute" which would include even those who are engaged in surfacing private driveways, tennis courts, parking areas for new industrial plants, etc., none of which plaintiff has ever contended to be the case.

4. Plaintiff relies heavily on the so-called "ice-cases" and carefully attempts to demonstrate that the Schroeder case has been wrongly decided by the Circuit Court of Appeals for the Tenth Circuit. The opinion neither mentions the "ice-cases" nor the Schroeder case, the majority opinion of which, admittedly, supports defendant's position.

5. The Court seems to rely on the fact that "eighty-five and one-half (85½%) percent of its total volume of work [fol. 18] for the period in question involved interstate facilities". The Federal Courts have held repeatedly that the coverage of the Fair Labor Standards Act depends upon the character of the activities of a particular employee rather than upon the nature of the business of the employer. Thus, an employer may engage in both interstate and intrastate activity without bringing those employees within the scope of the act who are engaged in the intrastate activity:

Walling v. Jacksonville Paper Co., 317 U. S. 564; 63 S. Ct. 332.

Keen v. Mid-Continental Petroleum Corp., 63 F. Supp. 120, 129 citing cases.

6. The Court's opinion does not discuss the impact of the amendments to the Fair Labor Standards Act of 1949, particularly in view of plaintiff's contention that defendant's employees are covered under the provisions of the Act affecting those employed "in the production of goods for commerce".

Respectfully submitted, McNees, Wallace & Nurick, By Samuel A. Schreckengaust, Jr., Commerce Building, Harrisburg, Pennsylvania, Attorneys for Defendant.

February 28, 1951.

[fol. 19] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed March 30, 1951

The Court having considered the pleadings, the stipulations of fact filed by the parties and testimony of witnesses, and having heard the arguments of counsel and considered the briefs filed herein, and due deliberation having been had and the Court having made its decision in writing, filed February 23, 1951, ordering judgment for the plaintiff in accordance therewith, it is hereby

Ordered, adjudged and decreed that defendant, its officers, agents, servants, employees, attorneys and all persons acting or claiming to act in its behalf and interest, be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201, et seq.), as amended, hereinafter referred to as the Act, in any of the following manners:

(1) Defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for a workweek longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not [fol. 20] less than one and one-half times the regular rate at which he is employed.

(2) Defendant shall not fail to make, keep, and preserve records of its employees, and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the regulations of the Administrator issued, and from time to time amended, pursuant to Sec. 11(c) of the Act, and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.

(s) Frederick V. Follmer, United States District Judge.

Dated: March 30, 1951.

[fol. 21] UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action File No. 3189

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

v.

ALSTATE CONSTRUCTION COMPANY, Defendant

Appendix to Appellee's Brief

STIPULATION DETERMINING CERTAIN PERTINENT FACTS—January 17, 1949

It is hereby stipulated and agreed for the purpose of this case, and for this case only, that the following facts are true and correct, and that either party may introduce them into evidence at the trial of this case, each party reserving the right to introduce such further evidence as it sees fit at the trial of the case.

1. Alstate Construction Company, defendant, is a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office at 313 Chestnut Street, Harrisburg, Pennsylvania, and plants located at R. D. #3, Hanover, Adams County, Pennsylvania; Sillyman Street, Cressona, Schuylkill

County, Pennsylvania; and at Naginey, Mifflin County, Pennsylvania.

[fol. 22] 2. Defendant's principal office and its branch establishments are all within the jurisdiction of the United States District Court for the Middle District of Pennsylvania.

3. Defendant corporation is engaged in the production, sale, distribution, and further application of a bituminous concrete material, known as amiesite, for use in the construction, repair, reconstruction, and maintenance of interstate highways and other instrumentalities of interstate commerce for and by the Commonwealth of Pennsylvania and numerous political subdivisions thereof, and for use by interstate railroads and other industrial and commercial firms engaged in commerce or in the production of goods for commerce. The said bituminous concrete material is produced at each of the aforesaid three plants located at Hanover, Cressona, and Naginey.

4. Said bituminous concrete material produced by defendant consists of the following ingredients: limestone, nap-tha, asphalt filler, and lime. Approximately 8,000 gallons of asphalt are received from the Baltimore, Maryland, Refinery of the Standard Oil Company of New Jersey and pumped from railroad tank cars into the company's storage tanks each week at the Hanover plant. Approximately four to five hours are spent by employees at the Hanover plant each week in receiving, handling, and pumping the asphalt from the tank cars into the storage tanks of the plant where it is used in the production of bituminous concrete materials. Substantially all other ingredients are quarried or manufactured and purchased in the Commonwealth of Pennsylvania.

[fol. 23] 5. Defendant owns no facilities and employs no persons outside of the Commonwealth of Pennsylvania.

6. The period covered by the inspection and for consideration in this stipulation shall be from June 30, 1945, through June 30, 1948.

7. The said bituminous concrete materials, also known as HE, a cold mix, and ID2, a hot mix, otherwise known as macadam blacktop, are primarily marketed by the company in the following ways:

(1) Direct contracts with the Commonwealth of Pennsylvania and many of its political subdivisions for material and labor for constructing, reconstructing, resurfacing and repairing interstate highways, all of which are accessible to and used to a substantial extent by interstate traffic.

(2) Direct contracts with commercial and industrial firms engaged in the production of goods for commerce for material and labor to be used in the construction, reconstruction, repair and maintenance of roads and facilities of such firms.

(3) Sale of bituminous concrete materials to the Commonwealth of Pennsylvania and many of its political subdivisions, to interstate railroad companies, and to commercial and industrial companies engaged in commerce or in the production of goods for commerce for use by these customers in the construction, reconstruction, repair and maintenance of highways, public roads, streets, railroad crossings, and other plant facilities.

8. The total volume of business for each plant for the three and one-half (3½) year period 1945 through June [fol. 24] 1948, and the volume of business with the Pennsylvania Department of Highways, political subdivisions of the Commonwealth of Pennsylvania, interstate railroad companies, industrial companies engaged in the production of goods for commerce, and private customers of Alstate Construction Company are as follows:

(Here follows 1 Paster, side folio 25)

[fol. 25]

CRESSONA PLANT

Total volume of business	Pennsylvania Department of Highways	Townships	Boroughs	Industrial	
1945 —$200,775.11	1945 —$159,983.60..79.68%	1945 — $102.37.. .05%	1945 — $7,500.49.. 3.73%	1945 — $9,692.70.. 4.82%	1945
1946 — 185,805.56	1946 — 99,318.11..53.45%	1946 — 2,046.00.. 1.10%	1946 — 5,741.97.. 3.08%	1946 — 27,146.06..14.60%	1946
1947 — 199,630.20	1947 — 55,092.58..27.59%	1947 — 55,163.51..27.63%	1947 — 5,150.21.. 2.57%	1947 — 38,667.71..19.36%	1947
1948*— 57,123.07	1948*— 32,783.26..57.38%	1948*— 7,015.80..12.28%	1948*— 2,970.68.. 5.20%	1948*— 9,629.22..16.85%	1948*
Total 643,334.84	347,177.65..53.96%	64,327.68.. 9.99%	21,362.45.. 3.32%	85,135.69..13.23%	

NAGINEY PLANT

1945 — $50,005.41	1945 — $17,006.70..34.12%	1945 — $6,801.45..13.60%	1945 —$14,975.91..29.94%	1945 — $7,559.25..15.11%	1945
1946 — 72,789.55	1946 — 40,099.00..55.08%	1946 — 5,617.00.. 7.71%	1946 — 17,323.35..23.79%	1946 — 2,643.75.. 3.63%	1946
1947 — 81,970.89	1947 — 20,881.43..25.47%	1947 — 6,029.50.. 7.35%	1947 — 20,295.35..24.75%	1947 — 15,051.62..18.36%	1947
1948*— 33,226.14	1948*— 1,107.50.. 3.33%	1948*— 4,784.11..14.39%	1948*— 1,115.80.. 3.35%	1948*— 7,579.81..22.81%	1948*
Total 237,991.99	79,154.63..33.25%	23,232.06.. 9.76%	53,710.41..22.56%	32,834.43..13.79%	

HANOVER PLANT

1945 — $48,374.00	1945 — $11,620.07..86.03%	1945 — $604.56.. .12%	1945 — $1,558.28.. 3.22%	1945 — $1,602.63.. 3.31%	1945
1946 — 81,835.14	1946 — 59,033.70..72.13%	1946 — 1,255.00.. 1.53%	1946 — 3,159.59.. 3.86%	1946 — 11,861.00..14.49%	1946
1947 — 132,481.96	1947 — 118,834.85..89.69%	1947 — 802.50.. .60%	1947 — 2,987.20.. 2.25%	1947 — 4,411.55.. 3.32%	1947
1948*— 28,258.77	1948*— 4,415.50..15.62%	1948*— 622.00.. 2.20%	1948*— 1,167.90.. 4.13%	1948*— 20,817.00..73.66%	1948*
Total 290,949.87	223,904.12..76.95%	3,284.06.. 1.12%	8,872.97.. 3.04%	38,692.18..13.29%	

* 1948 (up to June).

Industrial	Railroads	Private	
945 — $9,692.70.. 4.82%	1945 — $9,037.68.. 4.50%	1945 —$14,458.27.. 7.20%	1945
946 — 27,146.06..14.60%	1946 — 2,146.50.. 1.15%	1946 — 49,407.82..26.59%	1946
947 — 38,667.71..19.36%	1947 — 1,859.81.. .93%	1947 — 43,696.38..21.88%	1947
948*— 9,629.22..16.85%	1948*— 1,110.81.. 1.94%	1948*— 3,614.20.. 6.32%	1948*
85,135.69..13.23%	14,154.80.. 2.20%	111,176.67..17.28%	

945 — $7,559.25..15.11%	1945 — $930.00.. 1.85%	1945 — $2,672.10.. 5.34%	1945
946 — 2,643.75.. 3.63%	1946 — 565.00.. .77%	1946 — 6,541.45.. 8.98%	1946
947 — 15,051.62..18.36%	1947 — 531.00.. .64%	1947 — 19,181.99..23.40%	1947
948*— 7,579.81..22.81%	1948*— 179.75.. .54%	1948*— 18,459.17..55.55%	1948*
32,834.43..13.79%	2,205.75.. .92%	46,854.71..19.68%	

945 — $1,602.63.. 3.31%	1945	1945 — $2,988.46.. 6.17%	1945
946 — 11,861.00..14.49%	1946 — $2,234.74.. 2.73%	1946 — 4,291.11.. 5.24%	1946
947 — 4,411.55.. 3.32%	1947 — 1,500.31.. 1.13%	1947 — 3,945.55.. 2.97%	1947
948*— 20,817.00..73.66%	1948*— 831.57.. 2.94%	1948*— 404.80.. 1.43%	1948*
38,692.18..13.29%	4,566.62.. 1.56%	11,629.92.. 3.99%	

[fol. 26] 9. From the start of the period of inspection in June 1945 through June 1948, some of defendant corporation's contracts of the first type listed above, namely, contracts for *labor and material* for resurfacing and repairing highways and roads of the Commonwealth of Pennsylvania and its political subdivisions, were as follows:

Legislative Route 199-7, Traffic Route, U. S. 209, located in Frailey and Reiley Townships, Schuylkill County, 4.30 miles, placing bituminous surface over concrete road previously used as main highway to New York. Work started on 7-23-45 and was accepted 7-25-46. Bid accepted was $178,389.40.

Contract No. 53-629—Branch Township, Schuylkill County, from Willing Street, Llewellyn at U. S. Route 209 to Schober Street. Schober Street to Rt. 209 on Willing. Schober to RR street. On RR Street to Phoenix Park on Cemetery road to Minersville Boro line, 15,840 feet of HE surface, 1 inch in depth and including widening curves and patching. Work started in November 1946 and completed April 1947. Amount paid $12,100.00. Road links Llewellyn with U. S. Route 209 and is used by mine traffic.

Contract No. 53-645—Norwegian Township, Schuylkill County, township routes 620, 624 and 618, resurfacing with bituminous material HE .35 mile started approximately 8-1-47 and completed about 8-21-47, amount of bid $8,750.00.

Cass Township, Schuylkill County, starting at Jonestown on route 604 to Forrestville on route 608, and on to Primrose on route 561, on to Duncott and Heckscherville on route 563 and 606, 15840 feet resurfaced with 2-inch bitumi- [fol. 27] nous concrete, value of contract $17,920.00. Road used by mine traffic. Started approximately September 15, 1947, and completed about 10-15-47.

Tremont Township, Schuylkill County, township road #625, Legislative route #53029 from Larberry to Lincoln Colliery to the village of Lincoln, surface 16-foot road of native stone base with coarse bituminous concrete, 5280 feet, started about 11-1-47 and completed about 11-30-47. Amount of bid $24,073.00. Road provides access from mines to colliery and is used by coal trucks.

Branch Township, Schuylkill County, township routes 557 and 568, 8000 feet from Legislative route 199 to Phoenix Park. Surface stone road with bituminous concrete. Con-

nects U. S. Route 209 with village of Llewellyn at which is located coal breaker. Road used by coal trucks. Amount of bid $22,833.13. Started about 10-15-47 and completed 12-2-47.

Contract No. 44-213—5132 gal. C-2 bituminous materials, delivered and applied Township Road 383. Approved as of June 30, 1947.

Contract No. 44-205—Mifflin County, Granville Township, Route 337—patching and resurfacing—$2,295.00. Route 355—repairing base, surface treatment—$2,832.00.

Contract No. 44-202—Mifflin County, Granville Township, Route 337—30 ton patching—$300.00, resurfacing—$1,841.45. Approved August 1, 1945.

Contract No. 44-203—Mifflin County, Granville Township, Route 311—20 ton HE—$200.00, surface treatment—$2,072.00. Approved August 1945.

[fol. 28] Contract No. 53-625—Schuylkill County, Norwegian Township, approved August 28, 1946. Township Road 708, bituminous material in place (laid and rolled)—$10,430.00.

Contract No. 44-200—Mifflin County, Derry Township, approved August 14, 1945. High School building, Greenwood Avenue, Red Lane. Routes 502, 425, 685, 401 connecting highways—$3,850.00.

Contract No. 44-206—Mifflin County, Derry Township, approved August 27, 1946. Township Road 394 (Knepp Avenue, Lewiston Heights), base excavation, surfacing, subgrade and shoulders—$5,569.80.

10. During the same period from June 1945 through June 1948, some of defendant corporation's contracts of the second type, namely, *labor and material* sold to commercial and industrial firms for the construction, reconstruction, repair and maintenance of plant roads and facilities, were as follows:

Standard Steel Company, Burnham, Pennsylvania, Division of Baldwin Locomotive Works, 1948 (spring).

Philadelphia & Reading Coal and Iron Company (Oak Hill Collieries), October-November 1947.

Day and Zimmerman, April 1947.

Otto Collieries, September-October 1946.

H. C. Boyer (Locust Summit Breakers), April-May 1946.

11. During the same period, some of defendant corporation's contracts of the third type involving the *sale of bituminous concrete materials* to the Pennsylvania Highway Department and to industrial, commercial, and railway companies were as follows:

[fol. 29]

Date	Purchase Order No.	Amount	For Use On Traffic Route No.
6/25/48	H 82029	1,451 Ton—$11,825.65	162 (U. S. 209) from Tamaqua West, etc.
5/10/48	H 79934	5,636 Ton—$47,342.40	162 (U. S. 209).
3/10/48	H 77517	485 Ton—$2,910.00	
10/6/47	H 71520	203 Ton—$1,421.00	
9/29/47	H 71250	390 Ton—$2,515.50	
		324 Ton—$2,025.00	192.
9/18/47	H 70921	1,131 Ton—$6,503.00 F. O. B. plant	8510.
9/19/47 Hanover	H 70924	3,706 Ton—$20,383.00 F. O. B. plant	
8/15/47	H 69588	7,446 Ton—$53,611.20	
		20 Ton—	123.
2/19/47 Nagany	H 61415	20 Ton— $653.20	28.
		20 Ton—	499.
		40 Ton—	4406.
3/18/47	H 62880	1,000 Ton— $5,500.00	
5/27/47	H 66166	1,235 Ton—$7,101.25 F. O. B. plant	
6/11/47	H 67049	4,266 Ton—$30,501.92	
8/21/46	H 55105	1,000 Ton—$5,000.00	162.
9/6/46	H 55671	5,028 Ton—$28,156.80	
		8,602 Ton—$48,171.20	123.
7/3/46	H 53381	515 Ton—$2,703.75	123.
7/1/46	H 53267	671 Ton—$3,106.10	
5/8/46	H 51014	1,000 Ton—$5,000.00	231.
5/6/46	H 50832	633 Ton—$4,399.35	
		257 Ton—$1,786.15	
6/7/46	H 52281	2,054 Ton—$16,945.50	121.
		1,368 Ton—$10,602.00	126.
		1,513 Ton—$9,002.35	126.
8/24/45	H 42496	150 Ton—$900.00	230.
		75 Ton—$450.00	Various routes.
		150 Ton—$945.00	
		75 Ton—$468.75	
		300 Ton—$1,500.00	
		1,833 Ton—$11,621.22	
8/10/45	H 42116	1,447 Ton—$10,129.00	

Some of the industrial, commercial, and railway companies to whom bituminous concrete materials were sold for use in constructing, reconstructing, repairing, and maintaining plant facilities during the period 1945 through June 1948 were: Standard Steel Company, Pennsylvania Edison, American Viscose, Atlantic Refining Company, Industrial Oil Company, Pennsylvania Electric Company, Bethlehem Steel, Pennsylvania Railroad, Western Maryland Railroad Company, Sinclair Refining, U. S. Department of Interior, [fol. 30] Stewart & March; W. W. Utz, Hanover Construction Company, Standard Oil Company, Reading Company.

12. The defendant employs various classes of employees in its three plants and main office, including plant foremen,

field foremen, equipment operators, laborers, semi-skilled laborers, truck drivers, mixers, firemen, watchmen and clerks. Equipment operators are engaged in operating such equipment as spreaders, graders, pavers, shovels, and rollers used directly in the work of repairing and reconstructing interstate highways and roads. Truck drivers are engaged in the following activities:

(1) Haul stone from the Bethlehem Quarry to the Hanover plant for use in the production of bituminous concrete materials;

(2) Haul the bituminous concrete materials from the company's three plants to the job site;

(3) Haul the bituminous concrete materials from the company's plants to the job site where the material is dumped into "spreaders" or "pavers" on the highways for application thereon.

Laborers and semi-skilled laborers rake amiesite on the highways, spread stone base and perform pick and shovel work on roads. At the plants, mixers, firemen, watchmen, and clerks are engaged in, or are necessary to, the production of concrete bituminous materials.

13. All employees of the defendant are regularly employed in excess of 40 hours per week without payment of extra compensation at time and one-half their regular rate for such overtime hours, except that all employees who [fol. 31] work on Sundays have received therefor compensation at time and one-half their regular rate. Many of defendant's employees receive wages throughout the year, including months during which defendant's plants do not operate and the employees do not work.

14. Defendant, at its main office and each of its plants, prior to January 1, 1948, has failed to keep complete records showing occupation, day and time of beginning of workweek, number of hours worked each day, number of hours worked each week or the weekly excessive overtime compensation for each employee, as required by Regulations Part 516, Title 29, Chapter V, Code of Federal Regulations. Since January 1, 1948, defendant has kept records showing occupation, day and time of beginning of

workweek, number of hours worked each day, and number of hours worked each week.

Dated: 17 January 1949.

(s) Wm. S. Tyson, (s) Ernest N. Votaw, (s) Louis Weiner, Attorneys for Plaintiff.
(s) McNees, Wallace & Nurick, By (s) James H. Booser, (s) Samuel A. Schreckengaust, Jr., Attorneys for Defendant.

[fol. 32] UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted]

SUPPLEMENTAL STIPULATION DETERMINING CERTAIN PERTINENT FACTS—March 4, 1949

It is hereby further stipulated and agreed for the purpose of this case, and for this case only, that the following facts are true and correct:

1. Most of the work performed by employees employed at the Cressona and Naginey plants of the defendant, Alstate Construction Company (hereinafter called Alstate), on the highways, public roads, streets, and on facilities of industrial plants, referred to in paragraph 7, subsections (1) and (2), of the original stipulation 7, subsections (1) and (2), of the original stipulation dated January 17, 1949, consisted of the construction, extension, alteration, repair, resurfacing, reconstruction, and maintenance of existing highways, public roads and streets, and necessary facilities of industrial plants engaged in the production of goods for commerce.

2. Most of the work performed by employees employed at the Cressona and Naginey plants of Alstate for "private customers", as referred to in paragraph 7, subsection (3), of the original stipulation dated January 17, 1949, con-
[fol. 33] sisted of the construction of driveways, cemeteries, playgrounds, etc.

3. There is no segregation of work performed by employees employed at the Cressona and Naginey plants of

Alstate who are engaged in the construction, extension, alteration, repair, etc., of existing highways, public roads, streets, and necessary facilities of industrial plants engaged in the production of goods for commerce, from the work performed for "private customers".

4. The bituminous concrete materials produced by the employees of Alstate at the Hanover, Cressona, and Naginey plants was produced for use in the construction, extension, repair, resurfacing, reconstruction, and maintenance of existing highways, public roads and streets, and for use on necessary facilities of industrial plants engaged in the production of goods for commerce, and for use by private customers engaged neither in interstate commerce nor in the production of goods for commerce.

5. There is no segregation of work performed by off-the-road employees of Alstate at the Hanover, Cressona, or Naginey plants engaged in the production of bituminous concrete materials for use on existing highways, public roads and streets, and for use on necessary facilities of industrial plants engaged in the production of goods for commerce, from other uses for which the said bituminous concrete material is produced.

6. There is no segregation of work performed by truck drivers of Alstate at the Cressona, or Naginey plants in the hauling of bituminous concrete materials produced at [fol. 34] these plants for use on existing highways, public roads, streets, and on necessary facilities of industrial plants engaged in the production of goods for commerce, from other hauling work performed by the said truck drivers.

7. Except for certain types of material used for patching purposes in the winter season, practically all of the bituminous concrete material produced at Alstate's three plants is applied to highways, roads, etc. immediately after production.

Dated: 4 March, 1949.

(s) Ernest N. Votaw, (s) Louis Weiner, Attorneys for Plaintiff.

(s) McNees, Wallace & Nurick, By (s) Samuel A. Schreckengaust, Attorneys for Defendant, (s) John W. Grenoble, President.

[fol. 35] UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted]

Extracts From Transcript of Testimony

Before Judge Frederick V. Follmer, Harrisburg, Pa., March 1, 1949.

APPEARANCES: For the Plaintiff: Louis Widener, Esq., and Ernest N. Votaw, Esq., Philadelphia, Pa. For the Defendant: James M. Quigley, Esq., Harrisburg, Pa.

Reporter: John J. Butler.

* * * * * * *

MR. CHARLES H. EICHENBERG, called and sworn on behalf of the plaintiff, on direct and cross-examination, testified as follows:

Direct examination by Mr. Widener:

Q. What is your name?
A. Charles H. Eichenberg.
Q. Where do you live, Mr. Eichenberg?
A. Minersville, Pennsylvania.

[fol. 36] By the Court:

Q. Is that in Schuy-kill County?
A. Yes, sir.

By Mr. Widener:

Q. You have been employed by Alstate Construction Company?

A. Yes, sir, not at the present time. I have been last Summer.

Q. When did you start working for Alstate Construction Company?

A. The latter part of April or the beginning of May.

Q. What year?

A. 1948.

Q. What territory did you work out of?

A. Cressona, Schuylkill County.

Q. Is that one of the Alstate Construction Company's plants?

A. Yes, sir.

Q. What was your occupation?

A. I was a paver operator.

Q. What jobs did you work on?

A. I worked for the State Highway down on Route 209 between Tamaqua and Port Carbon resurfacing a concrete road, laid amiesite on it. I worked for the——

Q. Route 209, is that a United States Highway?

A. Yes, sir.

Q. While you worked on that job, who were you paid by?

A. Alstate Construction Company.

[fol. 37] Q. What kind of work was involved on the United States Route 209 job?

A. Resurfacing the concrete with amiesite.

Q. Was the road previously existing there?

A. Yes, sir.

Q. So that you laid new topping?

A. That is right, sir.

Q. Of amiesite?

A. Yes, sir.

Q. How long did you work on that job?

A. From May until September.

Q. Of what year?

A. 1948.

Q. Who worked with you on that job?

A. There was another man from the Alstate Construction Company was the roller operator by the name of Smith. I think his first name was Raymond. All the rest were State-employed men.

Q. Do you recall how many miles of road was resurfaced on that job?

A. No, I couldn't tell you exactly, sir.

Q. Did you work on any other job while you were employed by Alstate Construction Company?

A. Yes, sir, the Remaley job in Tamaqua, a parking lot. A parking lot we paved; and a place where they stored their steel, we paved that.

Q. By the Remailey job, what do you mean? Who or what was Remailey?

A. Remailey was the man who makes shakers for the colleries to size their coal. It is a steel plant.

Q. A steel fabricating plant?

A. Yes, sir.

[fol. 38] Q. Where is it located?

A. Tamaqua.

Q. And you say it does what?

A. It makes shakers, screens to size coal that they use at the different collieries.

Q. What kind of work did you do? A. Paved the parking lot for them and place to store steel, that was paved.

Q. Where was the parking lot located?

A. Right on their grounds in Tamaqua.

Q. Inside the plant grounds?

A. Yes, sir.

Q. Do you know what the parking lot was used for?

A. Their own equipment and storage.

Q. Storage of what?

A. Steel.

Q. Did Remailey use steel in the manufacture of its products do you know?

A. Yes, sir.

Q. Did you work on any roads in connection with the Ramailey job?

A. No, they connected right on the main street, one of the main streets of Tamaqua. We ran an apron from his lot right to the highway, the main street.

Q. By running an apron, just what do you mean?

A. Where cars or trucks come out of his property on to the main street. We paved that right out. You have a solid road right to the main road. It would be like a main intersection.

Q. Connecting Remailey with the main road?

A. Yes, sir.

[fol. 39] Q. Remailey trucks use that?

A. Yes, sir.

Q. What road was it this apron connected with?

A. Oh, I don't know. It is a street in Tamaqua which connects with 209.

Q. Did you work on any other job for Alstate Construction Company?

A. Yes, I worked on another road job in the Pocono Mountains the past Summer. I don't know what route it is. The same procedure was went through as went through on 209. We did the same thing. It was a concrete road, and we resurfaced it. I don't know the route. It was a State road.

Q. Do you know between which points that road connected?

A. It went into Stroudsburg.

Q. From where?

A. Sir, I can't tell you that.

Q. Which side of Stroudsburg was it, west, north, east, or south?

A. West. There was a little town outside of it called Sciota. That is the only town I know of.

Q. Did it connect Sciota with Stroudsburg?

A. Yes, sir.

Q. It was on that road?

A. Yes, sir.

Q. Were there any other jobs that you worked on for Alstate Construction Company during your employment?

A. Only the Lancaster Transportation which was a new job.

Q. What kind of work did you do?

[fol. 40] A. They built a new warehouse, and we graded and paved it for them, the parking lot where trailers loaded and unloaded. That is the only other job besides the road resurfacing jobs.

Q. Do you know whether the road that you worked on, particularly the United States Route 209, is used by the United States mails?

A. Yes, sir, it is.

Q. Do you know whether that road is used by freight and express trucks?

A. Yes, sir, it is.

Q. Do you know whether that road is used by traffic from Pennsylvania to other states and from other states into Pennsylvania?

A. Yes, sir.

By Mr. Widener:

That is all.

Cross-examination.

By Mr. Quigley:

Q. Mr. Eichenberg, in your work for Alstate Construction Company at the Remailey plant and at the Lancaster Transportation plant, was that new construction?

A. The Lancaster Transportation was a new construction job. The Remailey job, the parking lot was there but it was never paved before. It was the original ground. We just put the amiesite on top of it. The parking lot had been there for years. The only thing that was paved was from his fence or boundary line to the street. That had been concreted, and we resurfaced it with amiesite.

[fol. 41] Q. You say the parking lot at the Remailey plant was there, the nature of its surface?

A. Yes, sir.

Q. What was the nature of its surface?

A. Cinders.

By Mr. Quigley:

Your Honor, I understand the purpose of the testimony today was to establish the fact that the type of work done by Alstate Construction Company was primarily that of repairs, repairs to interstate highways. I would request that the testimony of the witness as to the Remailey plant and the Lancaster Transportation lot be stricken.

By Mr. Widener:

I think there was no limitation on the type of testimony to be taken today so long as it pertained to the stipulation that was agreed upon. I think what the witness testified to was in clarification as to the work that he did.

By the Court:

I am not familiar with what the stipulation was. I will overrule the objection and note an exception. I may change the ruling after I see the stipulation.

By Mr. Quigley:

That is all.

Redirect examination.

By Mr. Widener:

Q. How long did the Lancaster Transportation job take?
A. About three weeks, sir.

[fol. 42] By Mr. Widener:

That is all.

Mr. Pierce A. Kraeemes, called and sworn on behalf of the plaintiff, on direct- and cross-examination, testified as follows:

Direct examination.

By Mr. Widener:

Q. What is your name?
A. Pierce A. Kraeemes.
Q. Where do you live?
A. Pottsville Street, Cressona, Schuylkill County.
Q. Were you employed by Alstate Construction Company in June 1945, through June 1948, at any time during that period?
A. Yes, sir.
Q. When did you first start working for Alstate Construction Company?
A. I just can't recall the date.
Q. Will you please speak up?
A. I just can't recall the date. I worked for them once in 1929 to 1941 I think it was, and I just don't know the dates that I had started for them again. I came back again in 1946 I think it was.
Q. When you came back in 1946, what plant did you work for?
A. I come back to the Cressona plant.
Q. What work did you do at the Cressona plant?

A. Well first I was working around the plant. Then they gave me a title as truck foreman. I went around and [fol. 43] did different work, anything to be done from pick and shovel up to repairing equipment.

Q. Let's get just a bit more specific. You say you were a truck foreman at one time?

A. Yes, I worked at the plant so long. Then they gave me the title of truck foreman. I did anything that was to be done.

Q. As truck foreman, what did you do?

A. Sometimes I went out and used a pick and shovel, yes, sir, anything that was to be done.

Q. Did you take that material by truck to the job?

A. Yes, sir.

Q. Did any men work with you on that type of work?

A. Yes, sir.

Q. Who were the men that worked with you?

A. Well, sir, that is pretty hard to say, pretty near every man at the plant worked with us. We worked together, as far as I was concerned.

Q. Worked together in doing what?

A. Laying amiesite, yes, sir. When we were at the plant —there were three of us at the plant. When out on the road, the whole gang worked together.

Q. Did any of the men haul amiesite by truck with you while you were truck foreman?

A. Yes, different ones, Ray Smith; I believe William Munsinger; he hauled some at that time; John Niodna. I don't recall who the other truckdrivers were.

Q. About how many truckdrivers were there? A. At that time I believe there were six.

[fol. 44] Q. Where did they get the bituminous concrete material from which they hauled?

A. The Cressona plant.

Q. Did they make it at the Cressona plant?

A. That is right.

Q. They hauled it from the Cressona plant to where?

A. Well, to the different jobs. I worked at the job at the Oak Hill quarry and like that, sir; and different townships we hauled to. I just don't recall the township roads I helped to haul the material to.

Q. Did you haul the material to the job site and dump it on the side of the road or did you leave it on the road?

A. We left it on the road.

Q. At the plant where the bituminous concrete material was made, what did you do?

A. I used to stock the bins with stones and help make repairs, run loaders, run stones out of the yard; help take stones out of the cars. Some of the stones were in cars, I helped unload that, and make repairs on equipment.

Q. Where were the stones shipped from?

A. They were shipped in from the Bethlehem Steel. I don't know what plant.

Q. Did they have a stone quarry in Pennsylvania? A. I can't say that. I know most of the stone came from the Bethlehem Steel. Where it came from, I don't know.

Q. Did you do any mixing at that plant?

A. Yes, sir. I didn't do it down at Cressona. I was running the plant at Naginey.

[fol. 45] Q. Did you do any mixing at the Cressona plant?

A. Yes, not very much there.

Q. What other type of work did you do while you were employed at Cressona?

A. I used to do all their trailing after they got finished at one place, trailed their equipment from one place to another, hauling shovels and rollers around.

Q. To the job sites and back?

A. Yes, sir.

Q. Did you do any repair work on the trucking equipment?

A. Yes, sir.

Q. Was that the trucking equipment which was used in the repair of the State highways?

A. Yes, sir.

Q. Of the township roads?

A. Yes, sir.

Q. Of the borough roads?

A. Yes, sir.

Q. Did you work at any of the other plants of Alstate Construction Company?

A. Yes, sir, I ran a plant up at Naginey, Pennsylvania.

Q. When was that?

A. 1947 and 1948.

Q. What did you do at the Naginey plant?

A. I mixed all the material. Then I also helped when there were other jobs like when there wasn't very much mixing, I went out and helped on the road.

[fol. 46] Q. By helping on the road, what do you mean?

A. I helped lay the stone base; I helped take the equipment in to do what they wanted to do; I helped lay the stone base; hauled material of all kinds, whatever had to be hauled.

Q. What jobs were those or do you remember?

A. The one in particular was the Standard Steel. We resurfaced some road there and built part of another road.

Q. The Standard Steel is located where?

A. In Lewistown.

Q. Is that a division of the Baldwin Locomotive Parts?

A. That is right.

Q. What do they make?

A. Wheels for engines and cars. They also make different shafts for cars. It is sort of a steel—I don't know what you would call it—a steel foundry.

Q. What was the nature of the work you did at that plant?

A. I helped lay the stone base; I helped with the equipment; and also hauled amiesite.

Q. Was that on a road that was already there?

A. Part was there and part we built a new piece to.

Q. Was that an extension of an old piece of road?

A. That is right.

Q. Was that on the plant grounds?

A. Yes, sir, that was inside the fence.

Q. Did you do any other work connected with the Standard Steel job?

A. No, sir.

[fol. 47] Q. What other job did you work on? Did you work on any highway job?

A. We rebuilt some township roads that I helped haul equipment in on. I don't recall what jobs they were.

Q. Do you remember the townships?

A. I believe it was in Derry Township but I couldn't swear to that.

Q. What other job did you work on out of the—when you were employed at the Naginey plant?

A. We laid a road—we resurfaced a road. In fact we reconstructed a road in Naginey Township, the Borough of Naginey, or whatever that is. I guess that is owned by the Bethlehem Steel. I am not sure of that.

Q. Did you work at the Oak Hill quarry job?

A. That was worked out of the Cressona plant.

Q. The Oak Hill quarry job, what did you do; what kind of work?

A. I can't recall.

Q. Did you do any road work in connection with the quarry?

A. I just couldn't tell you. I know I went up after the roller. I moved a roller out of there. I was on so many jobs at different places, I just can't recall all of them.

By Mr. Widener:

That is all.

Cross-examination.

By Mr. Quigley:

No questions.

[fol. 48] By Mr. Widener:

John S. Niodna.

Mr. John S. Niodna, called and sworn on behalf of the Plaintiff, on direct- and cross-examination, testified as follows:

Direct examination.

By Mr. Widener:

Q. What is your name?

A. John S. Niodna.

Q. And where do you live, Mr. Niodna?

A. Middleport, Schuylkill County, Pennsylvania.

Q. Are you employed or were you employed by Alstate Construction Company?

A. Yes, sir.

Q. When did you start working for the company?

A. It was two days before V-J Day in 1945.

Q. And did you work for the company during 1945, 1946, 1947, and 1948?

A. Yes, sir, up to August of 1948.

Q. What plant did you work out of?

A. Cressona plant.

Q. What is your occupation?

A. You mean in general or individual?

Q. Well what did you work on mostly?

A. Well God only knows. Well I started off I laid concrete, graded edges and laid concrete, finished off concrete.

Q. On what?

A. The Tremont Highway.

Q. Then what did you do?

[fol. 49] A. Then I was a carpenter that fall and summer, building up buildings around the plant and repairing the plant for early 1946.

Q. Building what plant?

A. The Cressona plant. We built a big garage. We enclosed elevators and a mixing plant and corrugated iron, and I believe we put a new boiler in but I am not certain.

Q. Was this in connection with production, the repair work?

A. Yes, sir, that was repairing and building up the plant for 1946. In 1946 I operated a roller and finished up the Tremont Highway.

Q. You operated a roller on the Tremont Highway, what highway was that?

A. That was coming from Tremont and Pottsville and going to Lykens.

Q. Was that a United States highway?

A. I believe it was.

Q. Do you remember the number?

A. Offhand I couldn't recall unless I see it on the map.

By the Court:

Q. You don't know for sure whether it was a State highway?

A. It was a State highway but I don't know the route number.

By Mr. Widener:

Q. Where did the highway go?

A. It started off from Pottsville. There was a cut-off before you hit Minersville. You turn right and go up [fol. 50] over the hill into Llewellyn and Branchdale into Tremont and into Lykens and down in from there.

Q. You say you operated a roller on that job?

A. Yes, sir.

Q. What does that mean?

A. When the material was laid, I just flattened it out.

Q. Did you work on any other jobs on roads or highways while you were employed by Alstate Construction Company?

A. Yes, sir.

Q. What other jobs?

A. Case Township road, Branch Township, Tremont Township; that was 1946 and the early part of 1947.

Q. What did you do?

A. In 1946 I operated a roller; the early part of 1947 I operated a grader finishing off, putting the roads in shape. The roads were there and had a stone base in already. All I had to do was sweep up the ashes from the road, fill in the holes and all, and they came back and started laying the top over. There were jobs at Case Township that connected the main highways and a few others like that. The Oak Hill—I operated on that.

Q. Now in your work on these highways and roads that you just described, Mr. Niodna, was that work on roads which already were in place, already existed, or was that new construction?

A. A lot of these roads had black top on. At Case Township the majority of the roads were resurfaced. At Branch [fol. 51] Township a lot of roads had a stone base in, No. 4 stone. That was the base for final finishing, the

black top to go on. There were little holes in them, probably the wash. All you do is you got to carry stuff in from the ditch line.

Q. Carry what stuff?

A. The stone that was loose alongside the side. You bring that in and put the crown on and fill in the bituminous or whatever composition you use for that specific job.

Q. Was that the kind of road work that you did throughout your period of employment?

A. No, sir.

By the Court:

What is the purpose of all this examination?

By Mr. Widener:

The purpose of all this examination is to show Your Honor it wasn't original construction which these men were performing but that it was reconstruction, resurfacing, maintenance and extension of already existing roads.

By the Court:

What difference does it make? Isn't the whole case predicated on the question as to whether or not this work, whether it was new or old, was on interstate roads? Is that the question?

By Mr. Widener:

No, that is not the issue particularly.

By the Court:

What is the issue?

[fol. 52] By Mr. Widener:

The issue is whether or not the work which these men did was resurfacing of highways which carried persons or property in interstate commerce.

By the Court:

What difference does it make whether they were remaking a road or making a brand new road if it was interstate commerce?

By Mr. Widener:

This difference, if it was original construction there would be no coverage under the Act. We concede that. We say this isn't original construction, this is repairing, maintenance and resurfacting of already existing roads, and that kind of work, Your Honor, is covered. Since the defendant in the brief devoted twenty pages out of twenty-seven attempting to prove this was original construction, we felt we ought to show to the Court the kind and nature of the work that these men performed.

By the Court:

Is it your contention that if the State takes over a black top road that is bad and puts a cement road in that that is not new construction?

By Mr. Widener:

That is not original construction.

By the Court:

Is that where you differ? The defendant claims that is original construction?

[fol. 53] By Mr. Widener:

I assume that is the defendant's contention.

By the Court:

Under your theory you have to go through a field where there was no semblance of a road at all to have original construction?

By Mr. Widener:

Yes, that is original construction.

By the Court:

That certainly would be original. There is no question about that.

By Mr. Widener:

That certainly would be original. There is no question about that.

By the Court:

You insist upon the ultimate, no half-way on your theory?

By Mr. Widener:

No.

By the Court:

It has to go through the middle of a field to be original construction?

By Mr. Widener:

We say this, the kind of work these men performed for Alstate Construction Company was not original construction.

By Mr. Widener:

Q. Now what other work did you do—but before we go into the other types of work, did all your work consist of [fol. 54] resurfacing or repairing already existing roads or did you do any work on the construction of new roads which did not exist before?

A. Offhand I couldn't say either way.

Q. Did you work at Case Township?

A. Yes, sir.

Q. Was that work on roads which already existed; was that resurfacing?

A. Yes, sir. You see the stone base was in. That was put in during the era of the W. P. A. At that time there was stone brought in and manual labor cracked it by hand. All they put over it was plain ashes. Traffic kicked it back and forth, kicked it bad. Therefore, you have to roll anything like that to tie the stuff in right. All you had to do was scrape the dirt back in and roll it and put black

top on it. Some places there were areas—there were stones in areas, there were places where cars got at it bad and so on, that was put on with a peculiar foundation. Old roads that existed maybe five or ten yards may be cut up, some places a curve you make it straight, but all in all the road existed there.

By the Court:

Q. It might have been a dirt road?

A. Yes, sir, yes, all they did was to put the black surface on.

Q. Did you drive trucks?

A. Yes, sir, off and on.

Q. When you drove a truck, what did you carry?

[fol. 55] A. I carried HE, what we call amiesite, or HB, that is a different mix. That is what they mix in at the plant, HE or HB. I hauled it to McAdoo on the State Highway. I hauled it to Shenandoah; I hauled it to a bridge job connecting Heckscherville and Minersville, there was a bridge out. All they did was tear out the planking and put new planking in and resurface it with black top. I hauled it to Locust Gap where there was a plant up there of the Reading Coal and Iron Company. There was a road built up there. It was practically put on coal dirt. I hauled material on that.

Q. What kind of work did you do on that job?

A. Just hauled material there.

Q. Did you do any construction work on that job?

A. No, sir, I just hauled the material in there.

Q. Did you dump any of the material into pavers on the highway when you hauled?

A. Yes, sir, 209 and the road to McAdoo I dumped into the paver. Locust Dale or Locust Summit—I am not sure of the name. There is a plant of the Reading Coal and Iron Company there.

Q. Did you do any repairing of equipment?

A. Yes, sir. I was a maintenance man at this place here. That covered also if the fireman didn't come out, I fired the boiler. If the mixer didn't come out, I mixed the material.

Q. When was the equipment repaired?

A. All during the daytime or after you got finished. If the machine didn't work right all day, you fixed it then or later.

[fol. 56] Q. Did you do repair work during the dead season?

A. Yes, sir, I did repair work during the dead season.

By the Court:

What does that have to do with this?

By Mr. Widener:

That has to do with whether or not these men were covered for the period they were employed by Alstate Construction Company.

By the Witness:

We would close down in September and not work until the last of April. As soon as it got warm and hot enough to work to handle material the right way, we went out and worked.

By Mr. Widener:

Q. During the dead season you said you repaired equipment?

A. Yes, sir.

Q. What kind of equipment?

A. Graders, pavers, spreaders, new worms, drags, motors, anything; make sure the machine worked all right; went over it with a toothpick and comb.

Q. Was that equipment used the next season in construction work?

A. The rollers were all repaired—any type of equipment that needed repairs for the following season.

Q. Did you perform repair work during the regular season each day?

A. A little bit each day, maybe one day you would spend a longer time than another. If the roller operator didn't come out, I went and operated the roller. If the grader [fol. 57] operator didn't come out, I went and operated the grader.

Q. These roads you worked on, were they located in the anthracite coal regions?

A. Yes, sir.

Q. Were they used by coal trucks do you know

A. Yes, sir. They hauled coal out into the township. I know one place, Case Township, what they call the upper Jonestown Road there is a place Jonestown out in the valley; the top of the hill is another road, they have a plant there. If I am not mistaken, it is the Life Oak Coal Company. The Life Oak Coal Company hauls coal down the upper Jonestown Road and loads the coal into cars. There was a railroad track there. I don't know the name of the railroad. The road crosses the railroad track.

Did you do any laying of amiesite on the railroad crossing?

A. Pine Grove, for the Reading Company at Tamaqua, the Reading Station and Terminal. It was out from the platform about twenty or maybe thirty feet I imagine with about—I would say about 100 yards long approximately.

Q. These roads you worked on as a roller operator, were they used by the United States mails do you know?

A. They had mail boxes along the road and mail came through there, it must have.

Q. Do you know if the roads were used by trucks carrying goods between Pennsylvania and other states?

[fol. 58] A. I know 209 for sure and the other ones I know coal was hauled over them.

By Mr. Widener:

That is all.

Cross-examination.

By Mr. Quigley:

No questions.

* * * * * * *

By Mr. Quigley:

Your Honor, on that point mentioned by the witness and counsel, it seems to me it may be a matter of most as to

what is new construction. As to the type of work done, I am in a position to say they went out and did repair work on the road.

By the Court:

I don't think it should be necessary to bring witnesses in here to say a certain type of road existed someplace. You are certainly not in a position to dispute that.

By Mr. Quigley:

That is right.

* * * * * * *

Mr. John W. Grenoble, called and sworn as of cross-examination by the Plaintiff, on direct- and cross-examination, testified as follows:

Direct examination.

By Mr. Widener:

I am calling this witness for cross-examination as President of the Alstate Construction Company.

* * * * * * *

By Mr. Widener:

Q. Did you do any resurfacing of highways?
[fol. 59] A. Yes.
Q. Did you do any repairing of highways, patching of highways?
A. No, not State highways.
Q. What highways did you patch?
A. The only highway that we patched for the highway department, you might call it patching, was the State highway with concrete before it was covered with black top, but that in my mind is not repairing.

By Mr. Widener:

We object.

By the Court:

Let's not speak of what you think is repairing. That is what you asked him.

By Mr. Widener:

That is what I asked him.

By Mr. Widener:

Q. Did you patch any roads?

By the Court:

He already said he hasn't.

By Mr. Widener:

Q. Did you patch any roads?

A. I can't answer your question did we patch any roads for this reason——

Q. Just a minute. I am not interested in the reason why you can't answer the question. I just want to know whether your company did or did not patch any roads?

[fol. 60] A. If I may elaborate this way, if we have a road that we are to resurface and there is a depression in the road, or a "butt hole," as we call it, we will patch that first which, of course, probably in the eyes of the law, is patching a road but it is merely raising a depression so that when your paving machine comes over it, it doesn't throw the depression back into the road. The patch is covered with new surface. If that is called patching, yes, we patched lots of roads, miles and miles and miles, but then we have covered them with new surface, but I have never taken a contract from a political subdivision to go out and just patch a road. The State highway, the boroughs, and the townships all have their own crews for that.

Q. Did you do any work for the Standard Steel in Burnham, Pennsylvania?

A. Yes, sir.

Q. What kind of work was it, Mr. Grenoble?

A. Well we have done two or three different kinds of work. We resurfaced some roads and build some new ones.

Q. Where did you build the new ones?

A. On the island, as they call it, within the plant itself.

Q. Were those extension of roads?

A. No, they weren't extension of roads. They were replacing dirt roads with hard roads.

By the Court:

Q. You mean on their own private property?

A. Yes, sir.

[fol. 61] By Mr. Widener:

Q. What other type of work did you do for the Standard Steel Company?

A. We have done some outright machine work. In other words, we have rented them shovels; we have rented them graders. But outside of that that is all the work we can do for them. That is all our line would permit.

Q. And in the work for the Standard Steel Company that you have just enumerated for us, what type of employees did you employ, what kind of employees to work for you? Were they laborers, semi-skilled laborers, equipment operators?

A. We employed all of them.

Q. All of those classifications?

A. We had some laborers, equipment operators, and semi-skilled men.

Q. Was bituminous material used on that road supplied by one of your plants?

A. Yes, sir.

Q. Which plant was it?

A. The Naginey plant.

Q. Did you do any work for the American Viscose Company?

A. Yes, sir.

Q. What kind of work did you do for that company?

A. Resurfacing.

Q. Of what?

A. Old roads.

Q. Was that likewise within the plant confines?

[fol. 62] A. Well I can't say it was within the plant con-

fines. I would say it was on the plant property but not all entirely within the fence.

Q. Were those roads used by the American Viscose Company's trucks or other trucks?

A. Oh yes, surely. They are also used by the public, if I may add.

Q. How close to the plants were these roads located?

A. Well it goes—the road that would probably be in question goes from the State highway into the plant.

Q. What was the number of the State highway there, do you recall?

A. No, I can't offhand. I am sorry, that was a township road. It was a township road rather than a State highway. It was a township road but it was a hard-surfaced top.

Q. Did you do any other work for the American Viscose Company?

A. Only furnish material.

Q. Where was it furnished from?

A. Naginey. They merely wanted a truckload of material brought into the plant and our truck brought a load of material into the plant.

Q. Did you do any work for the Atlantic Refining Company?

A. A couple of small driveways along gas stations.

Q. Where were they located?

A. Several around Lewistown, several around Pottsville. In fact we done several of those in different localities, paved gas stations for them.

[fol. 63] Q. That bituminous material was furnished from the Naginey plant?

A. Not all of it.

Q. Where would it be furnished from—Hanover?

A. No, I would say from Cressona or Naginey.

Q. Do you know what kind of product the American Viscose Company produces?

A. They produce, so far as I know, a wood-pulp product for the manufacture of rayon, and they produce a cotton for the manufacture of automobile tires. They are interstate commerce, if that is what you are getting at.

Q. They ship goods in interstate commerce?

A. Yes, sir.

Q. How about the Standard Steel Company, do they ship goods into interstate commerce?

A. They are interstate commerce also, surely.

Q. Mr. Grenoble, at the Naginey plant did you keep any records which would show which jobs your employees worked on?

A. No. If you mean these small jobs, no.

Q. Did you keep any records as to whether or not they worked on jobs for private users or for industrial firms or for State highways; did you keep any records which would show each job they worked on?

A. When they were under contract, yes.

Q. When they were not under contract?

A. No. The men may have been on five or six jobs each day. It would be foolish. We can't see the reason for hiring two or three people to keep the public satisfied.

[fol. 64] Q. Any of the men may have worked on all kinds of work that the Allstate Construction Company performs?

A. In some plants, yes.

Q. How about the bituminous production people, did they produce bituminous material specially for industrial plants, highway jobs, private customers, or was bituminous material made up for all types of work without discrimination?

A. All the bituminous concrete mixed in all our plants is mixed in accordance with the Pennsylvania Department of Highway specifications unless the customer asks otherwise. However, when producing material for the Pennsylvania Department of Highways, they have their inspector on the job at all times at our plant to see that it is mixed in accordance with the specifications. When we produce for some individual that wants only four or five tons, it is produced with the same formula with no inspector there.

Q. You produce the same material with the same program, the same material comes out?

A. We try to stick as close to it as we can.

Now when we have contracts—and almost in 100% of the cases those are contracts with industrial firms covered by the interstate commerce laws.

* * * * * * *

(Court adjourned.)

[fol. 65] Appendix II

Extracts from Interpretative Bulletin

(a) *General principles.*—As has been made clear previously, where "goods" (as defined in the Act) are produced "for commerce," every employee engaged in the "production" (as explained in section 776.15 through 776.19) of such goods (including any part or ingredient thereof) is within the general coverage of the wage and hours provisions of the Act. Goods are produced for "commerce" if they are produced for "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."[47] Goods are produced "for" such commerce where the employer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in such interstate or foreign commerce.[48] If such movement of the goods in commerce can be reasonably anticipated by the employer when his employees perform work defined in the Act as "production" of such goods, it makes no difference whether he himself, or a subsequent owner or possessor of the goods, put the goods in [fol. 66] interstate or foreign commerce.[49] The fact that goods do move in interstate or foreign commerce is strong

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[47] Fair Labor Standards Act, Sec. 3 (b).

[48] *United States* v. *Darby*, 312 U. S. 100; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Schulte Co.* v. *Gangi*, 328 U. S. 108.

[49] *Schulte Co.* v. *Gangi*, 328 U. S. 108; *Warren-Bradshaw Drilling Co.* v. *Hall*, 417 U. S. 88. See paragraph (d) of this section.

evidence that the employer intended, hoped, expected, or had reason to believe that they would so move.

Although it is generally well understood that goods are produced "for" commerce if they are produced for movement in commerce to points outside the State, questions have been raised as to whether work done on goods may constitute production "for" commerce even though the goods do not ultimately leave the State. As is explained more fully in the paragraphs following, there are certain situations in which this may be true, either under the principles above stated (see paragraph (c) of this section), or because it appears that the goods are produced "for" commerce in the sense that they are produced for use directly in the furtherance, within the particular State, of the actual movement to, from, or across such State of interstate or foreign commerce. (See paragraph (b) of this section.)

(b) *Goods produced for direct furtherance of interstate movement.*—(1) The Act's definition of "commerce," as has been seen, describes a movement, among the several States or between any State and any outside place, of "trade, commerce, transportation, transmission, or communication." Whenever goods are produced "for" such movement, such goods are produced "for commerce," whether or not there is any expectation or reason to anticipate that the particular goods will leave the State.[50]

[fol. 67]

(2) The courts have held that particular goods are produced "for" commerce when they are produced with a view to their use, whether within or without the State, in the direct furtherance of the movement of interstate or foreign commerce. Thus, it is well settled that ice is produced "for" commerce when it is produced for use by interstate rail or motor carriers in the refrigeration or cooling of the equipment in which the interstate traffic actually moves, even though the particular ice may melt before the

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[50] *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654, affirmed in 131 F. 2d 518 (C. A. 5).

equipment in which it is placed leaves the State.[51] The goods (ice) produced for such use "enter into the very means of transportation by which the burdens of traffic are borne."[52] The same may be said of electrical energy produced and sold within a single State for such uses as lighting and operating signals on railroads and at airports to guide interstate traffic, lighting and operating radio stations transmitting programs interstate, and lighting and message transmission of telephone and telegraph companies.[53] Similar principles would apply to the production of fuel or water for use in the operation of railroads [fol. 68] with which interstate and foreign commerce is carried on; the production of radio or television scripts which provide the basis for programs transmitted interstate; the production of telephone and telegraph poles for use in the necessary repair, maintenance, or improvement of interstate communication systems; the production of crushed rock, ready-mixed concrete, cross-ties, concrete culvert pipe, bridge timbers, and similar items for use in the necessary repair, maintenance, or improvement of railroad roadbeds and bridges which serve as the instrumentalities over which interstate traffic moves.

Similarly, in the case of highways, pipe lines, and waterways which serve as instrumentalities of interstate and foreign commerce, the production of goods for use in the direct furtherance of the movement of commerce thereon would be the production of goods "for commerce." The production of materials[54] for use in the necessary maintenance,

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[51] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C. A. 4), certiorari denied 317 U. S. 634; *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C. A. 5); *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C. A. 6), certiorari denied 320 U. S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C. A. 6); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 357, 144 P. 2d 896.

[52] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C. A. 4).

[53] *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C. A. 5); see also *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C. A. 2).

[54] *Walling* v. *Staffen*, 5 W. H. Cases 1002 (W. D. N. Y.), 11 Labor Cases (CCH) par. 63, 102; *McComb* v. *Carter*, 8

repair, or improvement of the instrumentality so that the flow of commerce will not be impeded or impaired is an example of this. Thus, stone or ready-mixed concrete, crushed rock, sand, gravel and similar materials for bridges or dams; like materials or bituminous aggregate or oil for road surfacing; concrete or galvanized pipe for road drainage; bridge planks and timbers; paving blocks; and other such materials may be produced "for" commerce even [fol. 69] though they do not leave the State.

(3) This does not, however, necessarily mean that the production of such materials within a State is always production "for" commerce when the materials are used in the same State for the maintenance, repair, or improvement of highways or other instrumentalities carrying interstate traffic. In determining whether the production is actually "for" commerce in a situation where there is no reason to believe that the goods will leave the State, a practical judgment is required. Some illustrations may be helpful.

On the one hand, there are situations where there is little room for doubt that the goods are produced "for" commerce in the sense that the goods are intended for the direct furtherance of the movement of commerce over the instrumentalities of transportation and communication. The most obvious illustration is that of special-purpose goods such as cross-ties for railroads, telephone or telegraph poles, or concrete pipe designed for highway use. Another illustration is sand and gravel for highway repair or reconstruction which is produced from a borrow pit opened expressly for that purpose, or from the pits of an employer whose business operations are conducted wholly or in substantial part with the intent or purpose of filling highway contracts. The fact that a substantial portion of the employer's gross income is derived from supplying such materials for highway repair and reconstruction would be one indication that a substantial part of his business is directed to the purpose of meeting such needs of commerce.

W. H. Cases 498 (E. D. Va.) 16 Labor Cases (CCH) par. 64, 964. Contra, *McComb* v. *Trimmer*, 85 F. Supp. 565 (D. N. J.). Cf. *Engebretson* v. *Albrecht*, 150 F. 2d 602 (C. A. 7).

[fol. 70] On the other hand, there are situations where materials or other goods used in maintaining, repairing, or reconstructing instrumentalities of commerce are produced and supplied by local materialmen under circumstances which may require the conclusion that the goods are not produced "for" commerce. Thus, a materialman may be engaged in an essentially local business serving the usual miscellany of local customers, without any substantial part of such business being directed to meeting the needs of highway repair or reconstruction. If, on occasion, he happens to produce or supply some materials which are used within the State to meet such highway needs, and he does so as a mere incident of his essentially local business, the Administrator will not consider that his employees handling or working on such materials are producing goods "for" commerce. This is, rather, a typically local activity of the kind the Act was not intended to cover. The same may be said of the production of ice by an essentially local ice plant where the only basis of coverage is the delivery of ice for the water cooler in the community railroad station. The employees producing ice in the ice plant for local use would not by reason of this be covered as engaged in the production of goods "for" commerce.

Other illustrations might be given but these should emphasize the essential distinction which must be kept in mind. Borderline cases will, of course, arise. In each such case the facts must be examined and a determination made as to whether or not the goods may fairly be viewed as produced "for" use in the direct furtherance of the movement of interstate or foreign commerce, and thus "for" commerce.

[fol. 71]

Appendix III

Pertinent Statutory Provisions

Extract From Provisions of Fair Labor Act of 1938 and Fair Labor Standards Amendments of 1949

Section 3 (b) prior to amendment—

Sec. 3. As used in this Act—

* * * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

Section 3 (b) as amended—

Sec. 3. As used in this Act—

* * * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

Section 3 (j) prior to amendment—

Sec. 3. As used in this Act—

* * * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner [fol. 72] working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 3 (j) as amended—

Sec. 3. As used in this Act—

* * * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Section 7(a) as amended—

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is en-

gaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11 (c) not amended—

Sec. 11.

* * * * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him [fol. 73] and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Section 15 (a) (2) and (5) as amended—

Sec. 15 (a) After the expiration of ninety days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

Section 17 as amended—

Sec. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for [fols. 74-80] cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

[fol. 81] PETITION FOR REHEARING

To the Honorable the Judges of the Court of Appeals for the Third Circuit:

The opinion of this Court, filed April 9, 1952, affirms the judgment of the District Court, and it is respectfully urged that reargument be granted to consider the following:

1. The so-called "ice cases" upon which the Court appears to predicate its opinion that Alstate's off-the-road employees are engaged "in the production of goods for commerce" do not support such an unprecedented extension of coverage.

2. The judgment of the District Court, as affirmed, is so sweeping as to cover even those of defendant's employees whose activities are totally unconnected with interstate commerce.

This Court is respectfully referred to the accompanying brief.

Respectfully submitted, Samuel A. Schreckengaust, Jr., McNees, Wallace & Nurick, Twelfth Floor, Commerce Building, Harrisburg, Pa.

[fol. 82] CERTIFICATE

Samuel A. Schreckengaust, Jr., of counsel for Alstate Construction Company, petitioner herein, does hereby certify that the foregoing is presented in good faith and not for delay.

Samuel A. Schrechengaust, Jr.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

PETITION FOR SUPERSEDEAS PENDING APPEAL

To the Honorable, the Judges of the Court of Appeals for the Third Circuit:

The petition of Alstate Construction Company, appellant, by Samuel A. Schreckengaust, Jr., Esquire, of McNees, Wallace & Nurick, its attorneys, respectfully represents:

1. Alstate Construction Company has appealed from judgment rendered in the above-captioned matter by the United States District Court for the Middle District of Pennsylvania which provides, inter alia, as follows:

> (1) Defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for a workweek longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half time the regular rate at which he is employed.

2. Appellant has contended, and still contends, that the decision of the United States District Court is not only [fol. 84] contrary to the provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U.S.C. Title 29, Sec. 201, et seq.) as amended, but contrary to prior decisions, particularly insofar as such decisions apply to appellant's "off-the-road" employees.

3. In order to comply with the provision of the judgment as aforesaid, appellant will be required to pay additional compensation immediately to many of its employees unless

a supercedeas pending appeal be allowed, and appellant believes that if payment of such additional compensation be required pending disposition of the appeal, and if the judgment of the United States District Court be reversed, appellant will sustain irreparable loss as a result of the practical impossibility of recovering from its employees, many of whom are not permanent, such additional compensation.

4. Appellant proposes to set up a special bank account into which it will deposit all such additional compensation which may become payable to employees under the judgment of the lower court, pending disposition of this appeal, and the Government, by its attorneys, has indicated its consent, as appears more fully in Exhibit A attached hereto and incorporated herein by reference.

Wherefore, appellant prays your Honorable Court for a supersedeas pending disposition of its appeal, without bond.

(S.) Samuel A. Schreckengaust, Jr. of McNees, Wallace & Nurick, Commerce Building, 300 North Second Street, Harrisburg, Pennsylvania.

[fol. 85]

CONSENT

In consideration of the averments made in the foregoing petition and of the willingness of Alstate Construction Company, Appellant, to deposit all additional compensation which may become due to its employees under the judgment of the United States District Court, dated March 30, 1951 in the matter of Maurice J. Tobin, Secretary of Labor, United States of America v. Alstate Construction Company, Civil Action No. 3189, the said Maurice J. Tobin, Secretary of Labor, United States of America, Appellee, by its attorneys hereby consents to the granting of supersedeas pending appeal as prayed for, without bond.

(S.) William S. Tyson, Ernest N. Votaw, Louis Weiner.

[fol. 86] AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, ss:

Personally appeared before me a Notary Public, in and for the said state and county, John Grenoble who being duly sworn according to law, deposes and says that he is President of Alstate Construction Company; that the averments of fact contained in the foregoing petition for supercedeas pending appeal are true; and, that he is authorized by the corporation to make this affidavit.

(S.) John W. Grenoble.

Sworn to and subscribed before me, this 3rd day of May, A.D. 1951. (S.) May A. Rynard, Notary Public.

My commission expires January 29, 1955.

[fol. 87] [Endorsed:] In the United States Court of Appeals for the Third Circuit. No. 10464. Maurice J. Tobin, Secretary of Labor, United States Dept. of Labor v. Alstate Construction Company, Appellant. Received & Filed May 3, 1951. Ida O. Creskoff, Clerk.

[fol. 88] [Stamp:] Received & Filed May 8, 1951, Ida O. Creskoff, Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

ORDER

Present: Biggs, Chief Judge, and Maris and Staley, Circuit Judges.

And Now, to wit, this 8th day of May, 1951, it is Ordered that supersedeas be and the same hereby is granted to the appellant, Alstate Construction Company,

upon the filing of its own bond in the sum of $250.00, without surety.

For the Court, John Biggs, Jr., Chief Judge.

[fol. 89] [Stamp:] Received & Filed June 29, 1951, Ida O. Creskoff, Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

STIPULATION FOR EXTENSION OF TIME

And Now, this 23rd day of June, 1951, it appearing that due to vacation schedules, counsel for the Appellee will be unable to complete Appellee's Brief in the above matter within the time limit fixed by the Rules of Court, it is hereby stipulated and agreed that time for filing of Appellee's Brief and Supplemental Appendix (if any) be extended until August 20, 1951.

William S. Tyson, Solicitor; Bessie Margolin, Assistant Solicitor; William A. Lowe, Attorney; Ernest N. Votaw, Regional Attorney; Louis Weiner, Supervisory Attorney; United States Department of Labor Attorneys for Appellee.

Samuel A. Schreckengaust, Jr., McNees, Wallace & Nurick, Attorneys for Defendant, Appellant.

Approved: William H. Hastie, Circuit Judge, June 29, 1951.

[fol. 90] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued November 16, 1951

Before Maris, Kalodner and Staley, Circuit Judges

OPINION OF THE COURT—Filed April 9, 1952

By KALODNER, Circuit Judge:

Where an employer is engaged in the production and application of a bituminous material used in the repair and maintenance of highways over which interstate commerce moves, are those off-the-road employees who perform work essential to the production of the material "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938?

The question is presented by the instant appeal from the judgment of the District Court for the Middle District of Pennsylvania enjoining violations by Alstate Construction Company ("Alstate") of Sections 15(a)(2)[1] and [fol. 91] 15(a)(5)[2] of the Act, 52 Stat. 1060, as amended, 29 U.S.C. § 201 et seq. The facts are stated in detail in the

[1] Prohibiting violations of the minimum wage and maximum hour provisions of the Act.

[2] Prohibiting violations of the record-keeping provision of the Act.

opinion of the court below, 95 F. Supp. 585 (1951). They may be summarized as follows:

Alstate is engaged in the production, sale, distribution and application of a bituminous concrete material, known as amesite, which is used to resurface and repair streets, highways, railroad crossings and industrial facilities. The material is processed at three plants, located in Pennsylvania, and then applied by Alstate's employees. During the period under consideration (June 30, 1945, through June 30, 1948) over eighty-five per cent of the material was used (1) on interstate roads or roads carrying interstate traffic, or (2) by interstate railroads or industrial concerns producing and shipping goods in interstate commerce. Alstate employs various classes of employees at its plants and at the site of its operations. Laborers rake the amesite on the highways; at the plants, off-the-road employees, including mixers, firemen, watchmen and clerks, perform tasks essential to the production of the material. Most of these employees are regularly employed in excess of forty hours per week without receiving overtime wages, in violation of the Act;[3] prior to January 1, 1948, Alstate failed to keep proper records as required by regulations promulgated under the Act.[4] This action was brought by the

[3] Section 7(a) of the Act provides:

"No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of (forty) the hours . . . at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a).

[4] Section 11(c) of the Act provides:

"Every employer . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order . . ." 29 U.S.C. §211(c). See also 29 C.F.R. Part 516.

[fol. 92] Administrator[5] to enjoin continued violations. In the proceedings below, most of the facts were stipulated by the parties, and additional testimony was submitted. The District Court concluded "that the various plants of the defendant were all component parts of an integrated unit, eighty-five and one-half per cent of whose total output was directed toward the improvement of various interstate facilities, and that all of the employees of the defendant are definitely within the scope of the statute."

Alstate concedes that those of its employees who actually apply the amesite to the highways or other instrumentalities of commerce are within the scope of the Act; but contends that its off-the-road employees, i.e., the mixers and other plant employees who produce the amesite, do not have such immediacy of participation in interstate commerce so as to bring them within its coverage. We cannot subscribe to this contention.

While the precise question has never been passed upon by an appellate court,[6] analysis of the language of the

[5] The Secretary of the Department of Labor was substituted as a party plaintiff by stipulation.

[6] E. C. Schroeder Co., Inc. v. Clifton, 153 F.(2d) 385 (10th Cir. 1946), relied upon by Alstate, is not in point. It involved the application of the Act to employees engaged in the production, at the quarry, of rock which was later used on railroad and highway projects. However, the segments of railroad and highway on which the rock was used were not part of existing systems, but were new segments, not yet dedicated to use in interstate commerce and clearly beyond the contemplation of the Act. Kelly v. Ford, Bacon & Davis, Inc., 162 F.(2d) 555 (3rd Cir. 1947).

The District Courts which have considered the problem have not been in agreement. See, for example, McComb v. Trimmer, 85 F. Supp. 565 (D.N.J. 1949). *Contra:*, McComb v. Carter, Civil No. 745, E.D., Va., July 31, 1948 (16 Labor Cases § 69,964). The point was considered in Walling v. Craig, 53 F. Supp. 479, 483 (D. Minn. 1943), and decided in favor of Alstate's position. However, this was before the Administrator's assertion, based upon the Circuit Court decisions in the so-called "ice cases" (see footnote 7 *infra*), that these employees were covered. See 29 C.F.R. §776.21 (b) (1950 Supp. 149).

Supreme Court in recent cases arising under the Act leads inevitably to the conclusion that coverage was intended for off-the-road employees such as are here involved. By its terms, the Act applies to all employees "engaged in commerce or in the production of goods for commerce". This [fol. 63] clause was construed by the Supreme Court, in Roland Electrical Co. v. Walling, 326 U.S. 657, 663 (1946):

> "This does *not* require the employee to be directly 'engaged in commerce' among the several states. This does *not* require the employee to be employed even in the production of an article which *itself* becomes the subject of commerce or transportation among the several states. It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other 'articles or subjects of commerce of any character' which are produced for trade, commerce or transportation among the several states."

The Supreme Court has also held:

> "Vehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce." Overstreet v. North Shore Corp., 318 U.S. 125, 129 (1943).

Applying these principles, we are of the opinion that Alstate's off-the-road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce, are engaged "in the production of goods for commerce". The same rationale was employed by the Court of Appeals for the Fifth Circuit in Atlantic Co. v. Walling, 131 F.(2d) 518 (1942), in holding that the Act applied to employees who manufactured ice to refrigerate railroad cars transporting other commodities in interstate commerce, the ice being consumed in transit; and in Lewis v. Florida Power & Light Co., 154 F.(2d) 751 (1946), in which it was held that an employer engaged in the production of goods for commerce by furnishing elec-

[fol. 94] tricity to others who used it to transmit interstate messages and in the operation of interstate facilities.[7]

With respect to Alstate's contention that the sweep of the injunction is too broad in that it covers all of Alstate's employees, including those engaged in original construction and private projects unconnected with interstate commerce, it is answered by the very language of the injunction. The latter applies only to those "engaged in interstate commerce or in the production of goods for commerce, *within the meaning of the Act*". (emphasis supplied). The District Court found that, during the period involved, none of Alstate's work on interstate facilities involved original construction, and that there was no segregation of work performed by the off-the-road employees. In doing so it specifically held, and properly so, that "original construction is definitely beyond the contemplation of the Act." As long as any individual employee spends a substantial part of the work-week in commerce or in the production of goods for commerce, he is entitled to the full beiefits of the Act. Southern California Freight Lines v. McKeown, 148 F.(2d) 890 (9th Cir. 1945). At present, all of Alstate's employees fall into this category.

For the reasons stated, the judgment of the District Court will be affirmed.

A true Copy:

Teste:

——— ———, Clerk of the United States Court of Appeals for the Third Circuit.

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[7] See also Hamlet Ice Co. v. Fleming, 127 F.(2d) 165 (4th Cir. 1942), cert. denied, 317 U.S. 634; Chapman v. Home Ice Co. of Memphis, 136 F.(2d) 353 (6th Cir. 1943), cert. denied, 320 U.S. 761.

[fol. 95] [Stamp:] Received & Filed April 9, 1952, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: Maris, Kalodner and Staley, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest: Ida O. Creskoff, Clerk.

April 9, 1952

[fol. 96] [Stamp:] Received & Filed May 5, 1952, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FO THE THIRD DISTRICT

No. 10,464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Defendant-Appellant

Sur Petition for Rehearing

Present: Maris, Kalodner and Staley, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court: Harry E. Kalodner.

Dated: May 5, 1952.

[fol. 97] [Stamp:] Received & Filed May 13, 1952, Ida O. Creskoff, Clerk.

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Middle District of Pennsylvania, Greeting:

Whereas, lately in the United States District Court for the Middle District of Pennsylvania, before you or some of you, in a cause between Maurice J. Tobin, Secretary of Labor, United States Department of Labor, Plaintiff, (Appellee) and Alstate Construction Company, Defendant, (Appellant)—Civil Action No. 3189—a judgment was entered in the District Court on March 30, 1951, which judgment is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought

into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Alstate Construction Company agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And Whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

April 9, 1952

[fol. 98] You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 13th day of May in the year of our Lord one thousand nine hundred and fifty-two.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

Civil Action No. 3189. No. 10,464. Maurice J. Tobin, Secretary of Labor, United States Department of Labor vs. Alstate Construction Company, Appellant.

Copy Mandate. Received & Filed May 13, 1952, Ida O. Creskoff, Clerk.

[fol. 99] [Stamp:] Received & Filed Aug. 11, 1952, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,464

MAURICE J. TOBIN, Secretary of United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

ORDER

The Clerk of this Court is hereby authorized to transmit to the Clerk of the Supreme Court of the United States the complaint and the defendant's answer, which were filed in this Court as part of the record on appeal in the above-entitled case.

Mafis, Circuit Judge.

August 11, 1952

[fol. 100] Clerk's Certificate to foregoing. Transcript omitted in printing.

[fol. 101] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. —

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 29, 1952.

Harold A. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 11th day of July, 1952.

[fol. 95] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 8, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

(Rec'd Supreme Court, U. S.)
FILED
AUG 27 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No 296 October Term, 1952

ALSTATE CONSTRUCTION COMPANY,
Petitioner

v.

MAURICE J. TOBIN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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INDEX TO BRIEF

	Page
Jurisdiction	2
Opinions Below	2
Question Presented	3
Statute Involved	3
Statement	4
Specification of Errors to be Urged	10
Reasons relied on for Granting the Writ:	
I. The decision below, without precedent, introduces an entirely new concept for extending the coverage provisions of the Fair Labor Standards Act	11
II. The decision below in in conflict with a decision of the Court of Appeals for the Tenth Circuit and with a more recent decision of the Supreme Court of Pennsylvania	21
III. A further conflict has developed in the Court of Appeals for the Eighth Circuit	29
IV. The decision below involves an important question of federal law	30
V. The sweep of the injunction, as affirmed by the Court below, is too broad	31
Cases:	
Adams v. Wewoka Brick & Tile Co. (E.D. Okla., 1942), 5 Labor Cases, para. 61,069	20
Chapman v. Home Ice Co. of Memphis, 136 F. 2d 353, 355	30

Maurice J. Tobin, Secretary of Labor, United States Department of Labor v. E. C. Johnson, d/b/a Bramhill Company, decided July 17, 1952, Eighth Circuit 29
McComb v. Trimmer, 85 F. Supp. 565 (N.J. 1949) 17
McLeod v. Threlkeld, 319 U.S. 419 (1943) 11
Overstreet v. North Shore Corporation, 318 U.S. 125, 63 S. Ct. 494, 496 (1943) 12
Ramos v. P. R. Cement Corporation (P.R., 1946), 10 Labor Cases, para. 63,000, p. 68,775 19
James V. Reuter v. Walling, 137 F. 2d 315 (5th Cir., 1943), 321 U.S. 671, 88 L. Ed. 1001 (1943) 19
E. C. Schroeder Company, Inc. v. Clifton, et al., 153 F. 2d 385 (10th Cir., 1946), cert. den. 328 U.S. 858, 66 S. Ct. 1351 12
Adam Thomas v. Hempt Brothers, 371 Pa. 383 (1952) 21
Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S. Ct. 332, 337 31
Walling v. Craig, 53 F. Supp. 479 (Minn. 1943) 15, 16
Wiley v. Stewart Sand & Material Co., 206 S.W. 2d 362, 365, 366 (Kansas City Court of Appeals, Missouri, 1947) 18
Zehring v. Brown Materials, Ltd., 48 F. Supp. 740 (S.D. Calif., 1943) 20

STATUTES AND MISC.:

28 U.S.C. Sec. 1254 (1) 2
Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C.:
Sec. 15(a) (2) 4
Sec. 15(a) (5) 4
Sec. 201, et seq. 4
Sec. 206 4
Sec. 207 4
Sec. 211(c) 4
Sec. 215(a) (2 and 5) 4

Title 29, Chapter V. Code of Federal Regulations, Part 516 7
House Report No. 1453, 81st Congress, 1st Session, p. 15, dated October 17, 1949 14
Release G-162, Administrator of Wage and Hour Division 20

IN THE
SUPREME COURT OF THE UNITED STATES

No. October Term, 1952

ALSTATE CONSTRUCTION COMPANY,
Petitioner

v.

MAURICE J. TOBIN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Alstate Construction Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Third Circuit, having been rendered on April 9, 1952, and having become final on May 5, 1952, upon which date a timely petition for rehearing was denied, wherein the said Court of Appeals affirmed the judgment of the District Court. On July 11, 1952, upon application of counsel for petitioner, Mr. Justice Burton extended the time for filing petition for writ of certiorari to and including, August 29, 1952.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254 (1).

The opinion of the Court of Appeals for the Third Circuit was filed on April 9, 1952 and a petition for rehearing was denied on May 5, 1952.

OPINIONS BELOW

The opinion of the District Court is reported in 95 F. Supp. 844 and is also printed in the record.

The opinion of the Court of Appeals appears in 195 F. 2d 577 and is also printed in the record.

QUESTION PRESENTED

The question presented by this petition is:

Where an employer is engaged in the production, sale, distribution and application of a bituminous concrete material known as amesite, used solely within the Commonwealth of Pennsylvania in the repair and maintenance of highways, roads and streets over which interstate traffic moves, are those off-the-road employees who perform work essential to the production of the material "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended, 29 USCA, Section 201, et seq.?

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. § 201, et seq.) are set forth in the record.

STATEMENT

Respondent brought an action to enjoin petitioner, Alstate Construction Company, a Pennsylvania corporation with its principal office at Harrisburg, Pennsylvania, from continuing alleged violations of the overtime and record-keeping provisions of the so-called Wage and Hour Law, viz., the Fair Labor Standards Act of 1938, Act of June 25, 1938, Chapter 676, 52 Stat. 1060, 29 U.S.C.A., Section 201, et seq., hereinafter called the Act. Respondent sought specifically to enjoin alleged violations of the provisions of Sections 15(a) (2) and 15(a) (5) of the Act, 29 U.S.C.A., Section 215(a) (2 and 5). Those subdivisions of section 15 provide that it shall be unlawful for any person to violate any of the provisions of Sections 206 or 207 as to minimum wages or overtime pay and Section 211(c) as to the record-keeping. The bill charged no violations of Section 206 as to minimum wages.

Petitioner is engaged in the production, sale, distribution and application of a bituminous concrete material known as amesite. Petitioner's employees, facilities, and services are localized *solely* in the Commonwealth of Pennsylvania. Petitioner's three plants, located respectively in the counties of Adams, Mifflin and Schuylkill, produce amesite from exclusively local materials such as limestone, naptha, asphalt filler and lime manufactured and purchased or quarried in the Commonwealth of Pennsylvania (Defendant no longer

receives asphalt from Baltimore at its Adams County plant). This amesite, or bituminous concrete material, is also known as HE, a cold mix, and ID No. 2, a hot mix, otherwise known as macadam black top.

The said bituminous concrete materials, are primarily marketed by petitioner as follows:

(1) Contracts with the Commonwealth of Pennsylvania and many of its political subdivisions for the sale of material and for material and labor for constructing, reconstructing, resurfacing or repairing highways, roads and streets connecting with such highways, all of which are accessible to and regularly used by general vehicular traffic, including traffic moving between points in Pennsylvania and points in other states.

(2) Contracts with interstate railroad companies, commercial and industrial firms engaged in the production of goods for commerce, for sale of material and for material and labor to be used in the construction, reconstruction, repair or maintenance of roads, railroad crossings, parking areas and other facilities of such firms.

(3) Contracts with private persons and others having no interstate activity and not engaged in interstate commerce or the production of goods for commerce, for sale of material and for material and labor to be used in construction, reconstruction, repair and maintenance of road surface.

During the period under consideration (June 30, 1945 through July 30, 1948) over eighty-five percent of the material was used in fulfillment of contracts referred to in categories (1) and (2) above.

Statement

Petitioner employs various classes of employees in its three plants and main office, including plant foreman, field foreman, equipment operators, laborers, semi-skilled laborers, truck drivers, mixers, firemen, watchmen and clerks. Equipment operators are engaged in operating such equipment as spreaders, graders, pavers, shovels, and rollers at times used directly in the work of constructing, repairing, or reconstructing the said highways and roads. Truck drivers are engaged in the following activities:

(1) Haul stone from the Bethlehem, Pennsylvania quarry to the Hanover plant for use in the production of bituminous concrete materials.

(2) Haul the bituminous concrete materials from the company's Naginey and Cressona plants to the job site.

(3) Haul the bituminous concrete materials from the company's Naginey and Cressona plants to the job sites where the material is dumped into spreaders or pavers on the highway for application thereon.

(4) At the Hanover plant the petitioner's truck drivers do some hauling of the bituminous concrete materials from the plant to the job site. Pennsylvania Department of Highways, in some instances, has accepted bids for the said material F.O.B. plant, in which event the material is hauled from the plant to the job in Pennsylvania Highway Department trucks. For the most part, however, the trucking is performed by contract haulers, hauling from the plant to the job site, at an agreed price per ton, which is paid by the defendant.

Laborers and semi-skilled laborers rake amesite on the highways, spread stone base and perform pick and shovel work on roads. At the plants off-the-road employees, including mixers, firemen, watchmen, and clerks, are engaged in, or perform work incident to the production of bituminous concrete materials.

Prior to the decision of the Court of Appeals, most of the employees of the petitioner of the classes above described, were regularly employed in excess of forty hours per week without payment of extra compensation at time and one-half of their regular rate for such overtime hours. Wages are paid throughout the year to many of petitioner's employees, including months during which petitioner's plants do not operate and the employees do not work.

Prior to January 1, 1948, petitioner at its main office and each of its plants, failed to keep proper records as required by Title 29, Chapter V. Code of Federal Regulations, Part 516. Since January 1, 1948, petitioner has kept records showing occupation, day and time of beginning of work week, number of hours worked each day, and number of hours worked each week.

There is no segregation of work performed by truck drivers at the Cressona or Naginey plants in the hauling of road mix produced at these plants for use on existing highways, public roads and streets from other hauling work performed by them; nor is there any segregation of work performed by the so-called off-the-road employees employed at the company's three plants engaged in the production of road mix for use

on existing highways, public roads and streets from other uses for which the road mix is produced.

Respondent contended that employees of the petitioner actually engaged in the construction, repair, reconstruction, extension and maintenance of interstate highways, public roads and interstate railroads which are regularly used for interstate transportation are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938; also, that employees engaged in manufacturing and hauling road mixes produced at petitioner's plants for use on interstate highways are engaged "in the production of goods for commerce"; also, that truck drivers who haul raw materials or ingredients to defendant's plants producing road mixes for use on interstate highways are engaged "in the production of goods for commerce".

Petitioner, while admitting that its employees actually working on the highway or other instrumentality of interstate commerce itself, applying amesite in the repair or maintenance thereof as distinguished from original construction, are within the protection of the Fair Labor Standards Act, contends that its employees engaged in the construction of new highways and its off-the-road employees do not have such immediacy of participancy in interstate commerce as to bring them within the coverage of the said Act.

The District Court found "that the various plants of the defendant (petitioner) were all component parts of an integrated unit, eighty-five and one-half percent of whose total output was directed toward the improvement of various interstate facilities and that all of the

employees of petitioner are definitely within the scope of the statute"; *there was no determination as to whether petitioner's employees were engaged "in commerce or in the production of goods for commerce".*

Petitioner appealed to the United States Court of Appeals for the Third Circuit which affirmed the District Court and held that "Alstate's off-the-road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce are engaged in the production of goods for commerce."

SPECIFICATION OF ERRORS TO BE URGED

1. In holding that petitioner's off-the-road employees, in producing within a state material which is used to repair and maintain surfaces of instrumentalities of commerce in the same state are engaged in the production of goods, for commerce within the meaning of the Fair Labor Standards Act, as amended.

2. In affirming the judgment of the District Court which is so sweeping as to cover even those of petitioner's employees whose activities are totally unconnected with interstate commerce.

REASONS RELIED ON FOR GRANTING THE WRIT

I.

The decision below, without precedent, introduces an entirely new concept for extending the coverage provisions of the Fair Labor Standards Act.

Without precedent, the decision below introduces a new theory for bringing off-the-road employees within the coverage of the Act; namely, that they are engaged "in the production of goods for commerce." Not only is such extension of coverage without precedent, but it is contrary to the decisions of this and other courts, the legislative history of the Act, and, until recently, the Administrator's interpretation of the Act.

In 1943 this Court considered whether a cook and caretaker for a crew engaged in the maintenance of a railroad right of way was engaged in commerce or in the production of goods for commerce and held in *McLeod v. Threlkeld*, 319 U.S. 491 (1943), in its majority opinion by Mr. Justice Reed:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a rail-

road lie completely outside that clause. Our question is whether he was 'engaged in commerce,' * * *

"In the present instance, it is urged that the conception of 'in commerce' be extended beyond the employees engaged in actual work upon the transportation facilities. * * *

"We agree with the conclusion of the District Court and the Circuit Court of Appeals that this employee is not engaged in commerce under the Fair Labor Standards Act."

Thus the coverage of the Act was limited to employees engaged in actual work upon the transportation facilities. The law had been settled as to on-the-road employees in *Overstreet v. North Shore Corporation,* 318 U.S. 125, 63 S. Ct. 494, 496 (1943), where it had been held that employees engaged in operating and maintaining privately-owned toll roads and bridges over navigable waterways were "engaged in commerce" and thus the Act covered Overstreet, who operated a drawbridge, along with another employee who sold and collected toll tickets, and a third employee "engaged in maintenance and repair work on the road and the bridge."

In *E. C. Schroeder Company, Inc. v. Clifton, et al.,* 153 F. 2d 385 (10th Cir., 1946), cert. den. 328 U.S. 858, 66 S. Ct. 1351, the action was for overtime of employees engaged in a quarry in mining and processing stone for gravel cushion and riprap in the construction of relocated portions of a railroad and highway. Judge Bratton's opinion at pages 388-389 makes it very plain that the off-the-road quarry employees were not en-

gaged in a process or occupation necessary to the production of goods for commerce, nor were they engaged in commerce:

> "The very language of the Act relating to the production of goods for commerce seems to make it clear that the particular work of the employee, or the integrated effort of which his service is a part, must have for its purpose the production of goods for transportation in commerce. Some goods or some commodities must be produced for movement in commerce. That must be the purpose of the work of the particular employee or of the integrated effort of which his work is a part. * * * Their work was not directed to the production or manufacture of any thing for commerce, within the meaning of the Act. *They were engaged in local business.* * * * Off-the-railroad and off-the-highway employees, working at a remote point in the mining, production and processing of gravel cushion and riprap for use in the construction of relocated portions of the railroad and the highway, are not engaged in the movement of commerce or so closely related to it as to be for all practical purposes a part of it, within the meaning of the Act." (Emphasis added).

And at page 390, the court states:

> "* * * the Act does not speak of the production of goods for an instrumentality of commerce as distinguished from commerce itself. * * * If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of in-

terstate commerce, even though the goods were not to move in commerce, it certainly would have employed apt words to express the intention."

The Schroeder litigation is of significance in another respect. The other question there considered was the application of the Act to employees who were producing rock to riprap a dike built to protect an oil field from being flooded by a dam which had necessitated the relocation of the highway and railroad. Oil produced in that oil field moved in interstate commerce. The Court held that the employees producing the rock bore such a close and immediate tie to the integrated effort to effectuate the continued movement of oil in interstate commerce, that they were engaged in the production of goods for commerce and thus under the coverage provisions of the Act.

Congress expressly dealt with that situation in its restrictive amendments of 1949 to the Fair Labor Standards Act. The following conclusive statement appears in the House Managers' Report interpreting the Conference Report agreeing to amendments to the Fair Labor Standards Act, House Report No. 1453, 81st Congress, 1st Session, at page 15, under date of October 17, 1949:

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production: * * *

"2. Employees of a quarry engaged in mining and processing stone for local use in the con-

struction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (Schroeder v. Clifton, 153 F. (2d) C.C.A. 10); cert. den., 328 U.S. 858."

It thus appears that Congress expressly considered the Schroeder case, restricted that branch of the decision which had applied the Act to quarry employees, and left stand the other portions of the decision, hereinbefore quoted, holding the Act inapplicable to employees quarrying rock and preparing local materials for use upon interstate transportation lines.

The early case of *Walling v. Craig,* 53 F. Supp. 479 (Minn. 1943) involved facts closely paralleling petitioner's operation. There, defendant "* * * employed several hundred persons in the repair, maintenance and reconstruction of public roads * * *" and entered into and performed many contracts "* * * for the repair, maintenance and reconstruction of public roads and highways owned by said states or political subdivisions thereof. Generally, each section of public road or highway repaired, maintained or reconstructed by defendants and their employees pursuant to said contracts lies wholly within a single State, but each of said sections was a part of a network of roads and highways regularly traversed by vehicles operated by common and contract carriers and private persons for the transportation of persons and property from one state to another * * *" The Court then considered the ap-

plicability of the Act to the following classes of employees and described their duties:

A. Persons engaged upon the roadway;

B. Firemen or boiler operators who operated boilers or retorts connected with railway tank cars;

C. Distributor Truck Drivers and Tank Truck Drivers;

D. Office Employees who handled interstate mail, etc.;

E. Machine shop employees who repaired equipment; and

F. Off-the-Road employees who operated "bituminous mixing plants off-the-road. * * * The work of all such employees operating off-the-road consisted exclusively in the preparation and loading of materials for use within the state on the highway and did not require them to enter upon the highway in question."

The Court held that the persons engaged on the roadway (A), the firemen or boiler operators who operated boilers or retorts connected with railway tank cars (B), the distributor truck drivers and tank truck drivers (C), and the office employees (D), were engaged in commerce and therefore covered, *but* specifically held that the off-the-road employees were "*not* engaged in the production of goods for commerce, or in commerce or in work so closely related thereto as to be practically a part thereof and are not within the coverage prescribed by the Act." (Emphasis added).

The *Craig* case was recently cited with approval and discussed at length in *McComb v. Trimmer*, 85 F.

Supp. 565 (N. J. 1949), where some seven employees engaged in defendants' stone quarry in the production of crushed stone, shale, gravel and sand and in processes and occupations necessary thereto for use in building, repairing and maintaining roads. Judge Forman (at pages 567 and 570) said:

> "Obviously—and the plaintiff concedes it—since defendants' employees are not engaged directly upon, or associated with, any instrumentality of commerce itself, as in the foregoing cases, they are not engaged 'in' commerce. Therefore the plainitff seeks in this case to extend the coverage of the Act to these employees on the theory that since they are employed in producing gravel and shale for use in the repair and maintenance and improvement of county highways, concededly instrumentalities of commerce, they are engaged in the production of goods *for* interstate commerce within the scope of the Act. The plaintiff took the view that certain decisions influenced the Administrator of the Wage & Hour Division, United States Department of Labor, toward such broader coverage. . . . He accordingly, enunciated a new policy on this basis in his Release A-14, issued March, 1945, W. H. Man 1947 . . . induced by the decisions in the so-called 'ice company cases'. * * * There is no more reason to say that they are engaged in the production of goods for commerce than to say they are engaged in commerce. They come strictly within the classification well adopted by other courts of 'off-the-road' employees and are not contemplated for coverage by the Act. Hence

there must be judgment in favor of the defendants."

In *Wiley v. Stewart Sand & Material Co.*, 206 S.W. 2d 362, 365, 366 (Kansas City Court of Appeals, Missouri, 1947), presiding Judge Caye followed the *Schroeder* case, infra, and held that:

"The very language of the Act relating to the production of goods for commerce seems to make it clear that the particular work of the employee, or the integrated effort of which his services is a part, must have for its purpose *the production of goods for transportation in commerce. Some goods or some commodities must be produced for movement in commerce.* * * *

"In the instant case the plaintiffs were engaged in work, the purpose of which was to produce rock for use upon the highways and railroad beds within the State of Missouri. * * * The mere fact that goods produced by others for interstate commerce may be transported over the highways or the railroad tracks, will not bring these plaintiffs within the purview of the Act. Their work was not directed to the *production or manufacture* of anything for commerce, within the meaning of the Act. They were engaged in local business. * * *

"We conclude that the mere fact that plaintiffs were engaged in the production of rock to be used on the highways and railroad beds within the State of Missouri, does not bring them within the Fair Labor Standards Act. They were not engaged in commerce or in the *production* of goods

for commerce. We are supported in this conclusion by an interpretation of the Act given by the Wage and Hour Division of the Government which is charged with its enforcement. The relative part of the interpretation follows:

"'Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair, or reconstruction of essential instrumentalities of commerce do not become subject to the Act merely by reason of the use to which such products are put. A typical case is that of an employer who has contracted to repair a highway and has leased a gravel pit near the location of the job. In the pit his employees are engaged solely in digging gravel which is to be used within the state in the repair of the highway. Such employees are not "engaged in commerce" since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used. Neither are such employees engaged in producing goods for commerce.'" (Emphasis added).

See also:

James V. Reuter v. Walling, 137 F: 2d 315 (5th Cir., 1943), opinion of Dist. Ct. reinstated on technical grounds, 321 U. S. 671, 88 L. Ed. 1001 (1943);

Ramos v. P. R. Cement Corporation (not officially reported) (PR, 1946), 10 Labor Cases, para. 63,000, p. 68, 775;

Zehring v. Brown Materials, Ltd., 48 F. Supp. 740 (S. D. Calif., 1943);

Adams v. Wewoka Brick & Tile Co. (not officially reported) (E. D. Okla., 1942), 5 Labor Cases, para. 61,069.

Prior to 1945, the Administrator of the Wage and Hour Division had adopted the same interpretation of the Act which the Courts have adopted. On May 15, 1941, he issued Release G-162, which provides in paragraph VI as follows:

> "Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair, or reconstruction of essential instrumentalities of commerce do not become subject to the Act merely by reason of the use to which such products are put. * * * Such employees are not 'engaged in commerce' since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used. Neither are such employees engaged in producing goods for commerce. * * *"

In March of 1945, the Administrator enunciated a new interpretation to the effect that empolyees preparing local materials for instrumentalities of commerce were producing goods for commerce, but prior to the decision in the *Alstate* case, no appellate court had found any basis in the Act for such administrative legislation and had rejected it.

II.

The decision below is in conflict with a decision of the Court of Appeals for the Tenth Circuit and with a more recent decision of the Supreme Court of Pennsylvania.

It rarely happens that a petitioner for a writ of certiorari is in a position to incorporate in his petition an authoritative critique of the decision below. Fortunately, such a critique by the Supreme Court of Pennsylvania is to be found in the case of *Adam Thomas v. Hempt Brothers*, 371 Pa. 383 (1952). There, the plaintiff was an off-the-road employee who ". . . worked for defendant 'in producing, processing, weighing and mixing sand, stones and cement and loading trucks containing concrete and [in] giving directions to [defendant's] truck drivers as to the place of delivery daily of truckloads of sand and cement (concrete) to various customers' of the defendant. The customers were the Pennsylvania Turnpike, the Harrisburg Municipal Airport, the Pennsylvania Railroad Company, the U. S. Army Depot and the U. S. Navy Depot, all of which are located within the State of Pennsylvania. * * * it is readily conceded that the defendant's customers maintained facilities for handling persons or property moving in interstate commerce." The Pennsylvania Court, speaking through Justice Charles Alvin Jones, found that the plaintiff was neither engaged in commerce nor in the production of goods for commerce and thus was not entitled to recover from his employer overtime wages, liquidated damages and counsel fees under the provisions of the

Fair Labor Standards Act. In reaching its conclusion the court considered all of the authorities relied on herein by the petitioner, following which it discusses at length the *Alstate* decision of the court below.

Justice Jones first calls attention to the fact that the court below introduced an entirely new theory for bringing off-the-road employees within the coverage of the Act:

> "The Court of Appeals, in affirming the decree in the *Alstate* case, supra, went considerably further than the District Court had gone and held that '* * * Alstate's off-the-road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce, are engaged "in the production of goods for commerce."' This decision not only conflicted directly with the ruling in the *Schroeder* case, with respect to 'off-the-road' employees who locally produce and prepare materials for local use in the repair and maintenance of interstate instrumentalities, but it, at once, introduced an entirely new theory for bringing such employees within the coverage of the Act, namely, that they are engaged 'in the production of goods for commerce.' The way in which the learned court reached this conclusion was by reasoning that, inasmuch as *goods in commerce* would be hauled over the highways which were repaired and maintained with materials furnished by the 'off-the-road' employees, the latter were in an 'occupation directly essential to the production' of *such* goods within the intent of Sec. 3 (j) of the Act. The vast num-

ber of purely local employments that would be made subject to the Act on the basis of the theory of the *Alstate* case is not difficult to imagine. It is readily conceivable that many, if not most, local activities are 'necessary', at least in some remote degree, to the production of goods for commerce. Particularly pertinent becomes the caution voiced by the Court of Appeals for the Sixth Circuit, when construing the coverage of the Fair Labor Standards Act in *Chapman v. Home Ice Co. of Memphis,* 136 F. 2d 353, 355 (one of the so-called 'ice' cases), 'We are not unmindful of the fact that a rationalization based upon the doctrine of necessity may, under "The House That Jack Built" technic, lead to absurdity and end by ignoring all practical distinction between "what is parochial and what is national.' ".

The Pennsylvania Court considered the applicability of *E. C. Schroeder Co., Inc. v. Clifton,* supra, and concluded that the interpretation of the Act by the Court of Appeals for the Tenth Circuit was *more logical* than that adopted in the *Alstate* decision:

"When called upon to apply a federal statute, we necessarily give it the meaning which the highest federal judicial authority to pronounce upon it to date has ascribed to it; and, where courts of equal dignity have differed in their interpretations, we naturally accept the decision which to us reaches the more logical conclusion. Accordingly, we choose to follow the ruling of the *Schroeder* case with respect to the 'off-the-road' employees of

the independent contractor for reasons which we shall now express."

and the court brushes aside as unrealistic the suggestion in the footnote of the decision below that the Schroeder case is not in point:

"The difference which the opinion in the *Alstate* case attributes to the *Schroeder* case, wherein it states that the interstate instrumentalities in the latter case were 'new construction', is apparent rather than real. Actually, the work in the *Schroeder* case was not 'new construction' within the contemplation of that term as employed in the Act. It was but a relocation of existing arteries of interstate traffic (viz., a highway and a railroad) made necessary by the Federal Government's construction of the Denison Dam and Reservoir. Thus, it was noted in the Schroeder case (p. 387) that 'The relocated track has been connected with the existing track of the railroad company and has become a permanent part of it. The relocated portion of the highway when completed was or is to become a part of the existing highway but it had not been completed at the time of the trial of this case.' Certainly, the Court of Appeals, which decided the *Schroeder* case, did not regard 'new construction' as being present nor was it assigned as a reason for excluding the particular employees from the coverage of the Act as it should have been, and no doubt would have been, had the work been 'new' construction within the meaning of the Act: cf. *Kelly v. Ford, Beacon & Davis, Inc.*, 162 F. 2d 555 (C. A. 3)."

It would appear that the court below followed the Administrator in relying heavily upon the so-called "ice cases" in being led "inevitably to the conclusion that coverage was intended for off-the-road employees as are here involved." Such an unprecedented extension of coverage is not indicated by such cases. Justice Jones considers the "ice cases" and, as did a majority of the court in the Schroeder case, rejects them as not having any application to off-the-road employees who furnish materials locally for local use:

> "The *Alstate* opinion sought to distinguish the *Craig* case, supra, on the ground that it was decided prior to the Administrator's ruling of March 1945 that employees preparing local materials for local use by instrumentalities of commerce were producing goods for commerce. Incidentally, the *Schroeder* case was decided subsequent to the Administrator's ruling and in evident and authoritative disregard of it. In any event, the ruling was based upon the so-called 'ice cases' which are plainly distinguishable. Yet, one of them *Atlantic Co. v. Walling,* 131 F. 2d 518 C.A. 5) is cited in the *Alstate* opinion as authority for its ruling and two others (*Chapman v. Home Ice Co. of Memphis,* supra, and *Hamlet Ice Co. v. Fleming,* 127 F. 2d 165, C.A. 4) are cited in a footnote. The 'ice cases' were discriminatingly distinguished in the *Schroeder* case where Judge Bratton, speaking for the court, said (p. 389): 'Our attention is directed to the so-called ice cases [citing them]. In all of them, the ice company produced ice and sold it to a railroad company, an express company, or other

like agency, for icing refrigerator cars, icing dining cars, icing shipments of less than car lots, or other similar purpose; and the major contention of the ice company was that since it sold the ice at the point of production to the transportation company, the production was local and therefore its employees were not within the coverage of the Act. That contention was rejected. But in wide difference from the facts here, it affirmatively appears in three of those cases and is fairly inferable in the fourth, that some of the ice actually moved across state lines before being consumed by use or otherwise, and that it was produced and sold with knowledge and intent that it would move in that manner. It is true that in Atlantic Co. v. Walling, supra, the court said in effect that the production of goods for commerce, within the meaning of the Act, includes the production of goods for use by an instrumentality of interstate commerce as an essential part of such commerce, even though the particular goods produced do not move in commerce. But the Act does not speak of the production of goods for commerce as distinguished from commerce itself.' The foregoing distinction of the ice cases was quoted with approval and followed by the District Court for the District of New Jersey in the *Trimmer* case, supra.

"It may be further observed that the portion of the ice so used for refrigeration which was consumed before it crossed the State line veritably entered into and became a part of the goods in commerce whose freshness and edibility it helped

conserve. It was no doubt because of the expected physical relation or reaction between goods in commerce and the ice which refrigerates them that Sec. 1 (3) of the Interstate Commerce Act of 1887, as amended, 49 U.S.C.A. § 1 (3), expressly declared, inter alia, that 'transportation' (interstate) includes ' * * * all services in connection with the * * * refrigeration or icing * * * of property transported.' The very first of the 'ice cases' (sub. nom. *Fleming v. Atlantic Co.*, 40 F. Supp. 654, 661, D.C.M.D. Ga) specifically relied on this statutory declaration of the interstate character of the icing service of goods in commerce. The rationale of the 'ice cases' is obviously not applicable to 'off-the-road' employees who furnish materials locally for local use."

Following a consideration of the "ice cases", the Pennsylvania Court deals with the other cases cited by the court below and dismisses them as not in point:

"The case of *Roland Electrical Co. v. Walling*, 326 U.S. 657, which the *Alstate* opinion cites, is not presently in point. The employees who were there held to be under the Act made parts of electric motors which were used, inter alia, to manufacture goods for commerce. Consequently, under the definition of 'produced' in Sec. 3 (j) of the Act, such employees were held to be in an occupation necessary to the production of goods for commerce. The relation was direct and immediate. In *Lewis v. Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5), upon which the *Alstate* opinion also relies, the employees of an electrical company whose power

was utilized in commerce and for the production of goods in commerce were likewise held, under the broad definition of 'produced' in Sec. 3 (j), to be in an occupation necessary to the production of goods for commerce. There is no similarity between the facts of these cases and the 'off-the-road' employees of the instant case."

Finally, the Pennsylvania Court recognizes that Congress specifically considered the Schroeder case in connection with its adoption of the 1949 amendments to the Act, and concludes that had it considered the court's holding with reference to the off-the-road employee to be in error, it would have taken action to correct it:

"Finally, we accept the inference drawn in the Schroeder case that 'If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of interstate commerce, even though the goods were not to move in commerce, it certainly would have employed apt words to express the intention.' This view later received congressional confirmation: see Conference Report on Amendments to the Fair Labor Standards Act, 81st Cong., 1st Sess., 1949, U. S. Code Congressional Service, Vol. 2, pp. 2251, 2252-2254, where the *Schroeder* case was specifically treated with. The portion of the decision in that case which had extended the coverage of the Act to the quarry workers who prepared the rock for building the dike to protect the oil field from flooding was offset and avoided for the future by recommended amendment which became the Act of October 26,

1949, c. 736, Sec. 3 (j), 63 Stat. 911, 29 U.S.C.A. § 203 Pkt. Part."

Thus, it is contended that the decision below is in conflict with the earlier decision of the Court of Appeals for the Tenth Circuit in the Schroeder case, and with the more recent decision of the Pennsylvania Supreme Court—both of which reach the "more logical" conclusion. In view of the confusion which these conflicting opinions will cause in the public mind in connection with a federal legal question in which many employers are interested, it is urged that the petition for writ of certiorari should be allowed.

III.

A further conflict has developed in the Court of Appeals for the Eighth Circuit.

A further conflict has developed as a result of the recent decision of the Court of Appeals for the Eighth Circuit in *Maurice J. Tobin, Secretary of Labor, United States Department of Labor v. E. C. Johnson, d/b/a Bramhill Company,* decided July 17, 1952, and not yet reported, wherein without discussion, the court approved of the decision below. A petition for certiorari is now being prepared and will be filed in this Court in connection with the Johnson case. In order that this question might be finally determined, petitioner urges that the prayer of the Johnson petition be granted.

IV.

The decision below involves an important question of federal law.

In the words of Mr. Justice Jones of the Supreme Court of Pennsylvania:

> "* * * The vast number of purely local employments that would be made subject to the Act on the basis of the theory of the Alstate case is not difficult to imagine. *It is readily conceivable that many, if not most, local activities are 'necessary'* at least in some remote degree, to the production of goods for commerce. * * *"

Thus, the decision is important not only to the petitioner, but to many local employers not presently considered to be under the coverage provisions of the Act. Just as the Administrator in 1945 seized the ice cases as authority for repudiation of his earlier interpretation of the Act, so it is conceivable that the Secretary will now seize upon the *Alstate* and *Johnson* cases to justify further inroads into the local domain. Judge Simons in *Chapman v. Home Ice Co. of Memphis,* 136 F. 2d 353, 355, aptly characterized such extension of coverage as "The House that Jack Built technic".

V.

The sweep of the injunction as affirmed by the Court below is too broad.

The Court below answers the petitioner's objection that the sweep of the injunction is too broad by referring to the language of the injunction. But, if petitioner is to be guided by the language of the decision of the district court as to which of its employees are covered by the Act, it is confronted by the sweeping assertion that since "eighty-five and one-half percent" of its "total output was directed toward the improvement of various interstate facilities", "all of the employees of the defendant [petitioner] are definitely within the scope of the statute".

As was contended in our brief on appeal, we believe that the fundamental error in the opinion of the District Court lies in the fact that the Court chose to view petitioner's over-all operation rather than focus its inquiry upon the work performed by the individual employee: *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S. Ct. 332, at 337. Judge Follmer said *all* of Alstate's employees were covered at a time when he found, for example, that at the Naginey Plant, approximately twenty (20%) percent of the output went into private work. Did Judge Follmer mean that, even those employees who worked on private work during a work week were covered? Should the petitioner be obliged to act at its peril in determining which of his employees are engaged in interstate commerce or in the production

of goods for commerce, *within the meaning of the act?* Judge Follmer's opinion, we believe, is susceptible of interpretation that since 85½% of the total output goes into interstate facilities, *all* employees of Alstate are covered *all* of the time. We do not believe that such a conclusion was intended or would be legally sound, but we do contend that the opinion erroneously suggests a wide departure from the Act and cases decided thereunder which require that the determination of coverage be made upon an individual employee basis.

CONCLUSION

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

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IN THE

Supreme Court of the United States

October Term, 1952

NO. 296

ALSTATE CONSTRUCTION COMPANY,
Petitioner

v.

MAURICE J. TOBIN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX TO BRIEF

	Page
Jurisdiction	1
Opinion Below	1
Question Presented	2
Statute Involved	2
Statement of the Case	3
Specification of Errors	9
Argument:	
I. The contention that Petitioner's off-the-road employees are "engaged in the production of goods for commerce" finds no support from the language of the act, the legislative history and consideration of policy leading to its enactment or the interpretations placed thereon by the Administrator	10
II. Petitioner's off-the-road employees are not engaged "in commerce" nor are they so intimately related thereto as to be in practice and in legal contemplation a part of it	25
III. Judicial expression has been overwhelmingly in support of Petitioner's position	28
IV. The sweep of the injunction as affirmed by the court below is too broad	30

TABLE OF CITATIONS

Cases:

Atlantic Co. v. Walling, 131 F. 2d 518, 520 (C.A. 5 1942)	23
Barbe v. Cummins Construction Co., 49 F. Supp. 168 (D. C. Md. 1943)	29

Bennett v. Loftis Co., 167 F. 2d 286 (C.A. 4 1948) . . . 26, 27
Chapman v. Home Ice Company of Memphis, 136 F. 2d 353, 355 (C.A. 6 1943), cert den. 320 U.S. 761, 64 S. Ct. 72 . . . 23
Crabb v. Welden Bros., 65 F. Supp. 369 (S. D. Iowa 1946) . . . 28
D'Harris Brick and Tile Co., March 3, 1949, case No. 39-RC-23, 81 N.L.R.B. No. 173 . . . 30
Fleming v. Atlantic Co., 40 F. Supp. 654, 661 (N.D. Ga. 1951) . . . 23, 24
Fitzgerald v. Pedersen, 324 U.S. 720, 65 S. Ct. 892 (1945) . . . 25
Hamlet Ice Co. v. Fleming, 127 F. 2d 165, 167, 170 (C.A. 4 1942), cert. den., 317 U.S. 634, 63 S. Ct. 29 . . . 23, 24
Harvey M. Hanawalt, d/b/a Hanawalt Brothers, Dec. 16, 1948, case No. 21-RC-459, 80 N.L.R.B. No. 196 . . . 30
A. B. Kerochbaum Co. v. Walling, 316 U.S. 517, 62 S. Ct. 1116 (1942) . . . 14
Landadio v. White Construction Co., 163 F. 2d 383 (C.A. 2 1947) . . . 26
McComb v. Carter, D. C. 8 W. H. Cases, 498 . . . 27
McComb v. Trimmer, 85 F. Supp. 565 (D.C. N.J. 1949) . . . 11, 14, 27, 29
McLeod v. Threlkeld, 319 U.S. 491, 63 S. Ct. 1248 (1943) . . . 26
Okeelanta Sugar Co-Operative, March 9, 1949, case No. 10-RC-373, 81 N.L.R.B. No. 200 . . . 30
Overstreet v. North Shore Corporation, 318 U.S. 125, 63 S. Ct. 494 (1943) . . . 14, 25, 26, 27
Pedersen v. J. H. Fitzgerald Construction Co., 318 U.S. 740, 63 S. Ct. 558 (1943), modified and petition for rehearing denied, 318 U.S. 742, 63 S. Ct. 558 (1943) . . . 25, 27
A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 65 S. Ct. 807 (1945) . . . 32
Ramos v. Puerto Rico Cement Corporation, Civil Case No. 4583, 10 C.C.H. Labor Cases, 63000 (March 1, 1946) . . . 29

Ritch v. Puget Sound Bridge and Dredging Co., 156 F. 2d 334 (C.A. 9 1946) 26

Roland Electric Co. v. Walling, 326 U.S. 657, 66 S. Ct. 413 (1946) 15

E. C. Schroeder Company, Inc. v. Clifton, et al., 153 F. 2d 385 (C.A. 10, 1946), cert. den. 328 U.S. 858, 66 S. Ct. 1351 ..... 10, 13, 29

Thomas v. Hempt Bros., 371 Pa. 383, 89 A. 2d 776 (1952) 11, 28

Tobin v. Pennington Winter Const. Co., 198 F. 2d 334, 337 (C.A. 10 1952) 22

Tobin v. Johnson, 198 F. 2d 130 (C.A. 8 1952) 27, 32

United States v. Darby, 312 U.S. 100, 61 S. Ct. 451 (1941) 12, 14, 18

Walling v. Craig, 53 F. Supp. 479 (D.C. Minn. 1943) 11, 28

Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S. Ct. 332 (1943) 14, 31

Walling v. McCrady Const. Co., 156 F. 2d 932 (C.A. 3 1946) 27

Walling v. Patton-Tully Transp. Co., 134 F. 2d 945 (C.A. 6 1943) 27

Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 508, 65 S. Ct. 325 (1945) 32

Wiley v. Stewart Sand and Material Co., 206 S.W. 2d 362 (Kans. Cy. C. A. Mo.) 28

STATUTES:

Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. § 201, et seq.) 2, 3

Interstate Commerce Act of 1887, as amended in 1906, 34 Statutes at Large, 584, Chapter 3591, 49 U.S. C.A., Section 1 (3), pages 11 and 46 24

Labor Management Relations Act, 1947, June 23, 1947, C. 120, Sec. 1, 61 Stat. 136, 29 USCA 141 29

Title 29, Chapter V, Code of Federal Regulations, Part 516 6

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1952
No. 296

Alstate Construction Company,
Petitioner

v.

Maurice J. Tobin, Secretary of United States Department of Labor

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254 (1).

OPINIONS BELOW

The opinion of the District Court is reported in 95 F. Supp. 844 and is also printed in the transcript of the record (R-7).

The opinion of the Court of Appeals appears in 195 F. 2d 577, and is also printed in the transcript of the record (R-66).

QUESTION PRESENTED

The question presented is:

Where an employer is engaged in the production, sale, distribution and application of a bituminous concrete material known as amesite, originating and used solely within the Commonwealth of Pennsylvania, in the repair and maintenance of highways, roads and streets over which interstate traffic moves, are those off-the-road employees who perform work essential to the production of the material "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended, 29 USCA, Section 201, et seq.?

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. § 201, et seq.), are set forth in the transcript of the record (R-56-59).

STATEMENT OF THE CASE

Respondent brought an action to enjoin Petitioner, Alstate Construction Company, a Pennsylvania corporation with its principal office at Harrisburg, Pennsylvania, from continuing alleged violations of the overtime and record-keeping provisions of the so-called Wage and Hour Law, viz., the Fair Labor Standards Act of 1938, Act of June 25, 1938, Chapter 676, 52 Stat. 1060, 29 U.S.C.A., Section 201, et seq., hereinafter called the Act. Respondent sought specifically to enjoin alleged violations of the provisions of Sections 15 (a) (2) and 15(a) (5) of the Act, 29 U.S.C. A., Section 215(a) (2 and 5). Those subdivisions of Section 15 provide that it shall be unlawful for any person to violate any of the provisions of Sections 206 or 207 as to minimum wages or overtime pay and Section 211(c) as to record-keeping. The bill charged no violations of Section 206 as to minimum wages.

Petitioner is engaged in the production, sale, distribution and application of a bituminous concrete material known as amesite. Petitioner's employees, facilities, and services are localized *solely* in the Commonwealth of Pennsylvania. Petitioner's three plants, located respectively in the counties of Adams, Mifflin and Schuylkill, produce amesite from exclusively local materials such as limestone, naphtha, asphalt filler and lime, manufactured and purchased or quarried in the Commonwealth of Pennsylvania. (Defendant has not

for several years received asphalt from Baltimore at its Adams County plant nor has it received at any of its plants any material from points outside of Pennsylvania.) This amesite, or bituminous concrete material, is also known as HE, a cold mix, and ID No. 2, a hot mix, otherwise known as macadam black top (R-8).

The said bituminous concrete materials are primarily marketed by Petitioner as follows:

(1) Contracts with the Commonwealth of Pennsylvania and many of its political subdivisions for the sale of material and for material and labor for constructing, reconstructing, resurfacing or repairing highways, roads and streets connecting with such highways, all of which are accessible to and regularly used by general vehicular traffic, including traffic moving between points in Pennsylvania and points in other states.

(2) Contracts with interstate railroad companies, commercial and industrial firms engaged in the production of goods for commerce, for sale of material and for material and labor to be used in the construction, reconstruction, repair or maintenance of roads, railroad crossings, parking areas and other facilities of such firms.

(3) Contracts with private persons and others having no interstate activity and not engaged in interstate commerce or the production of goods for commerce, for sale of material and for material and labor to be used in construction, reconstruction, repair and maintenance of road surface (R-8, 9).

During the period under consideration (June 30, 1945, through July 30, 1948), over eighty-five (85%) percent of the material was used in fulfillment of contracts referred to in categories (1) and (2) above.

Petitioner employs various classes of employees in its three plants and main office, including plant foremen, field foremen, equipment operators, laborers, semi-skilled laborers, truck drivers, mixers, firemen, watchmen and clerks. Equipment operators are engaged in operating such equipment as spreaders, graders, pavers, shovels, and rollers at times used directly in the work of constructing, repairing, or reconstructing the said highways and roads. Truck drivers are engaged in the following activities.

(1) Haul stone from the Bethlehem, Pennsylvania, quarry to the Hanover plant for use in the production of bituminous concrete materials.

(2) Haul the bituminous concrete materials from the Company's Naginey and Cressona plants to the job site.

(3) Haul the bituminous concrete materials from the Company's Naginey and Cressona plants to the job sites where the material is dumped into spreaders or pavers on the highway for application thereon.

(4) At the Hanover plant the Petitioner's truck drivers do some hauling of the bituminous concrete materials from the plant to the job site. Pennsylvania Department of Highways, in some instances, has accepted bids for the said material

F.O.B. plant, in which event the material is hauled from the plant to the job in Pennsylvania Highway Department trucks. For the most part, however, the trucking is performed by contract haulers, hauling from the plant to the job site, at an agreed price per ton, which is paid by the defendant (R-9, 10).

Laborers and semi-skilled laborers rake amesite on the highways, spread stone base and perform pick and shovel work on roads. At the plants, off-the-road employees, including mixers, firemen, watchmen, and clerks, are engaged in, or perform work incident to, the production of bituminous concrete materials (R-10).

Prior to the decision of the Court of Appeals, most of the employees of the Petitioner of the classes above described were regularly employed in excess of forty hours per week without payment of extra compensation at the time and one-half of their regular rate for such overtime hours. Wages are paid throughout the year to many of Petitioner's employees, including months during which Petitioner's plants do not operate and the employees do not work (R-10).

Prior to January 1, 1948, Petitioner at its main office and each of its plants, failed to keep proper records as required by Title 29, Chapter V, Code of Federal Regulations, Part 516. Since January 1, 1948, Petitioner has kept records showing occupation, day and time of beginning of work week, number of hours worked each day, and number of hours worked each week (R-10, 11).

There is no segregation of work performed by truck drivers at the Cressona or Naginey plants in the hauling of road mix produced at these plants for use on existing highways, public roads and streets from other hauling work performed by them; nor is there any segregation of work performed by the so-called off-the-road employees employed at the Company's three plants engaged in the production of road mix for use on existing highways, public roads and streets from other uses for which the road mix is produced (R-11).

Respondent contended that employees of the Petitioner, actually engaged in the construction, repair, reconstruction, extension and maintenance of interstate highways, public roads and interstate railroads which are regularly used for interstate transportation, are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938; also, that employees engaged in manufacturing and hauling road mixes produced at Petitioner's plants for use on interstate highways are engaged "in the production of goods for commerce"; also, that truck drivers who haul raw materials or ingredients to defendant's plants producing road mixes for use on interstate highways are engaged "in the production of goods for commerce" (R-11).

Petitioner, while admitting that its employees actually working on the highway or other instrumentality of interstate commerce itself, applying amesite in the repair or maintenance thereof as distinguished from original construction, are within the protection of the Fair Labor Standards Act, contended that its employees engaged in the construction of new highways

and its off-the-road employees do not have such immediacy of participancy in interstate commerce as to bring them within the coverage of the said Act (R-11).

The District Court found "that the various plants of the defendant (petitioner) were all component parts of an integrated unit, eighty-five and one-half percent of whose total output was directed toward the improvement of various interstate facilities and that all of the employees of petitioner are definitely within the scope of the statute" (R-14). *There was no determination by the District Court as to whether petitioner's employees were engaged "in commerce or in the production of goods for commerce".*

Petitioner appealed to the United States Court of Appeals for the Third Circuit, which affirmed the District Court and held that "Alstate's off-the-road employees, in producing material which is used to repair and maintain the surface of instrumentalities of commerce are engaged in the production of goods for commerce." (R-69)

SPECIFICATION OF ERRORS

1. In holding that Petitioner's "off-the-road employees", in producing within a state, material which is used to repair and maintain surfaces of instrumentalities of commerce in the same state are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, as amended.

2. In affirming the judgment of the District Court which is so sweeping as to cover even those of Petitioner's employees whose activities are totally unconnected with interstate commerce.

ARGUMENT

I.

The contention that Petitioner's off-the-road employees are "engaged in the production of goods for commerce" finds no support from the language of the act, the legislative history and consideration of policy leading to its enactment or the interpretations placed thereon by the Administrator.

Without precedent, the decision below introduces a new theory for bringing employees within the coverage provision of the A ; namely, that even though the activities of such employees are strictly local in character and have no connection with the ultimate production of any commodity which in fact moves across state lines, nevertheless such employees are "engaged in the production of goods for commerce". This bold and startling concept finds no support from (a) a common sense view of the language of the Act, (b) the legislative history and considerations of policy leading to its enactment or (c) the interpretations placed upon the Act by the Administrator.

Throughout this case we have used the expression "off-the-road employees" to designate those of Petitioner's employees who are one or more steps removed from those employees who physically work on the instrumentality of commerce. The terminology is not original. E.g., *E. C. Schroeder Company, Inc. v. Clifton, et al.*, 153 F. 2d 385 (C.A. 10, 1946), cert. den., 328

U.S. 858, 66 S.Ct. 1351; *Walling v. Craig*, 53 F. Supp. 479 (D.C. Minn. 1943); *McComb v. Trimmer*, 85 F. Supp. 565 (D.C. N.J. 1949); *Thomas v. Hempt Bros.*, 371 Pa. 383, 89 A. 2d 776 (1952). We hold no particular brief for the expression except that it has proved to be a convenient shorthand means of referring to mixers, laborers and others engaged in manufacturing and hauling road mixes produced at Petitioner's plants and truck drivers employed to haul raw materials or ingredients to Petitioner's plants. We shall continue to use the expression herein.

At this point in our argument we are not concerned with Respondent's contention that the off-the-road employees are engaged "in commerce" as well as "in the production of goods for commerce".

(a) A common sense view of the language

In essence, Respondent urges that *production of goods for commerce* is synonymous with *production of goods for use by or in connection with instrumentalities of commerce.* Thus, in his memorandum submitted in response to the petition for certiorari in this case, he refers to the "popular understanding and dictionary definition" of the word "for" as including "to serve as, or as a part of; to supply the need of; in order to effect." It is to be noted, however, that such dictionary meanings appearing in *Webster's New International Dictionary*, 1948 Ed., p. 984, follow the broad introduction, to wit: "In the most general sense, indicating

that in consideration of which, in view of which, or with reference to which, anything is, is done or takes place." Which, of the scores of definitions listed therein for the preposition, was in the mind of Congress upon enactment of the Fair Labor Standards Act of 1938 must be determined from a consideratoin of the legislative history, administrative interpretation, and pronouncements by this Court. Thus, it would appear that in the *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451 (1941), this Court considered the use of the preposition in its most general sense when stating at page 113:

> "While manufacture is not of itself interstate commerce, the *shipment* of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce." (Emphasis supplied).

and at page 117:

> "The obvious purpose of the Act was not only to prevent the interstate transportation of the prescribed product but to stop the initial step toward transportation, production with the purpose of so transporting it."

But, whatever meaning may be attributed to the preposition "for", it is apparent that the Respondent is desirous of expanding the word "commerce" to mean "instrumentalities of commerce". Thus, in his memorandum, Respondent argues that since the "road material here is stipulated to have been produced, directly and specifically, 'for use in the construction, extension, repair, resurfacing, reconstruction, and maintenance

of existing [interstate] highways', it follows that its production is 'for commerce' within the plain ordinary meaning of the words." Such conclusion "follows" only if "commerce" and "instrumentalities of commerce" are synonymous! We submit they are not.

Section 2(a) of the Act, wherein the legislative findings are expressed, states that the existence of substandard labor conditions:

> "(1) causes *commerce* and channels and *instrumentalities of commerce* to be used to spread and perpetuate such labor conditions among the several states." (Emphasis added).

And in Section 3(b) the word "commerce" is defined as:

> "trade, commerce, transportation, transmission or communication among the several states or between any state or place outside thereof."

That Congress had *"instrumentalities of commerce"* in mind is obvious from Section 2(a) of the Act, and it is significant that it did not include the term in its definition of "commerce". Certainly, if it had wished to include "instrumentality of commerce", it would have done so.

Circuit Judge Bratton in *E. C. Schroeder Company, Inc. v. Clifton*, 153 F. 2d (C.A. 10 1946), cert. den., 328 U.S. 858, 66 S. Ct. 1351, commented upon this very argument which was made in that case, stating:

> ". . . But the Act does not speak of the production of goods for an instrumentality of commerce as distinguished from commerce itself. The

> Act is to be accorded a liberal construction. But the function of the judicial interpretation of a statute is to bring out and give effect to that which is already in it, latent or otherwise. It is not to add new provisions, substantive or otherwise, which the legislative tribunal in the exercise of its permitted choice omitted or withheld. If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of commerce, it certainly would have employed apt words to express the intention. We fail to find anything in the language of the Act or its legislative history which lends support to the view that Congress purposed to bring workmen of that class within the coverage."

And, Judge Bratton's conclusion was adopted by Judge Forman in *McComb v. Trimmer,* 85 F. Supp. 565 (D.C.N.J. 1949), at page 568.

(b) The legislative history and consideration of policy

This Court has considered the legislative history and consideration of policy at length in its earlier decisions relative to the Act: *U.S. v. Darby,* 312 U.S. 100, 61 S. Ct. 451 (1941); *A. B. Kerochbaum Co. v. Walling,* 316 U.S. 517, 62 S.Ct. 1116 (1942); *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 63 S.Ct. 332 (1943); *Overstreet v. North Shore Corporation,* 318

U.S. 125, 63 S.Ct. 494 (1943); *Roland Electric Co. v. Walling*, 326 U.S. 657, 66 S.Ct. 413 (1946).

On May 24, 1937, the bill (known as S. 2475 and H.R. 7200) was introduced by Senator Black, accompanied by a presidential message. 81 Cong. Rec. 4960-4961. President Roosevelt said: "Goods produced under conditions which do not meet rudimentary standards of decency should be contraband and ought not to be allowed to pollute the channels of interstate trade." Id. 4961. That he contemplated the ultimate movement of goods in interstate commerce is implicit in his caution that, "Although a goodly portion of the goods of American industry *move* in interstate commerce and will be covered by the legislation which we recommend, there are many purely local pursuits and services which no federal legislation can effectively cover. . . . The proposed Federal legislation should be a stimulus and not a hindrance to State action." (Emphasis added). Id. 4961.

The respective bills which were later to become entitled the "Fair Labor Standards Act of 1938" were referred to the Committee on Education and Labor in the Senate and to the Committee on Labor in the House. Joint hearings were had before these Committees June 2-5, 7-15, 21 and 22, 1937. Hearings on S. 2475 and H.R. 7200, 75th Cong., 1st Sess. It was reported to the Senate July 8, 1937, with amendments. Sen. Rep. No. 884, 75th Cong., 1st Sess. After full discussion it was passed by the Senate July 31, 1937, with amendments. 81 Cong. Rec. 7957. In that form it was referred to the Committee on Labor of the House, and was reported out August 6, 1937 (H. Rep. No. 1452, 75th

Cong., 1st Sess.), without significant changes as to coverage or exemptions. After debate, it was recommitted to the Committee on Labor December 17, 1937 (82 Cong. Rec. 1835), including particularly the substitution of a single Administrator in place of the Fair Labor Standards Board proposed in the original Bill. It was again reported favorably by the House Committee on Labor April 21, 1938, with amendments. H. Rep. No. 2182, 75th Cong., 3d Sess. After debate, it was passed by the House May 24, 1938. 83 Cong. Rec. 7449. It went to conference between the two Houses and was reported out of conference with several amendments in substantially its present form and the conference reports were adopted in both Houses June 14, 1938.

One reads the reports of debate in the Congressional Record as well as the Committee Reports, hereinafter referred to, without finding a single suggestion that an employee engaged in the production of goods for "instrumentalities of commerce", as distinguished from "commerce", was intended to be covered. In fact, the idea of *movement of goods* across state lines is present throughout such debates and committee reports.

The original Senate Committee Report (Sen. Rep. No. 884, 75th Cong., 1st Sess.) states: "The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce." Id. page 5. It is to be noted that the

bill was then designed to cover all employees, with certain specific exemptions, and prohibited sale or shipment in interstate commerce of any unfair goods. Further, it branded unlawful the employment of a person in the production of unfair goods intended to be sold or shipped in interstate commerce. Id. pages 7, 8. *Movement* of goods in interstate commerce was certainly contemplated.

The House Committee Report (House Rep. No. 1452, 75th Cong., 1st Sess.) recommending amendments to S. 2475, declared:

> "It (the bill) applies only to industries engaged in the production of goods for interstate commerce and directly affecting interstate commerce. It does not affect the purely local intrastate business." Id. page 9.

> "Prohibitions Relating to Interstate Commerce; Provisions

> Part III of the bill contains the provisions (1) barring from interstate commerce goods which were produced under substandard labor conditions set forth in the bill, (2) prohibiting the employment under substandard labor conditions of any employee engaged in interstate commerce, or in the production of goods intended for transportation in violation of the provisions of the bill, and (3) protecting interstate commerce from the effect of substandard labor conditions. This part also contains provisions relating to imports." Id. page 16.

The House Committee Report (House Rep. No. 2182, 75th Cong., 3d Sess.) considered the proposed wage and hour law which still was in the form covering persons employed in industries *affecting* commerce. There, in the committee's Summary and Explanation of provisions, it declares that, inter alia, "the States are unable to remedy the situation (i.e. substandard labor conditions) because goods which were *produced* under substandard labor conditions in one State may, protected by the failure of Congress to exercise its commerce power, *flow freely into another state* which attempts to maintain fair labor standards." (Emphasis added). Id. page 7.

The Conference Report (House Rep. No. 2738, 75th Cong. 3d Sess.) adopted the Bill in its final form.

Judicial recognition of the legislative intent is found in the first case to reach this Court. In *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 454. There, Mr. Justice Stone said at page 109:

> "The Fair Labor Standards Act sets up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaraiton of policy in § 2(a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st. Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess., Conference

Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states."

Also, at page 115:

"The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. McCray v. United States, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; Sonzinsky v. United States, 300 U.S. 506, 513, 57 S. Ct. 554, 555, 81 L. Ed. 772, and cases cited. 'The judicial cannot prescribe to the legislative departments of the governmental limitations upon the exercise of its acknowledged power'. Veazie Bank

v. Fenno, 8 Wall. 533, 548, 19 L. Ed. 482. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress."

A later expression of legislative intent with reference to the Act accompanied the 1949 amendments. Apparently disturbed over the gradual extension of coverage through judicial interpretation, Congress re-defined the word "produced" to eliminate from the coverage of the Act those employees not employed "in any closely related process or occupation directly essential to the production thereof, in any State." (Sec. 203 (j)).

In this connection, the Schroeder case, supra, is of further significance. There, another question considered was the application of the Act to employees who were producing rock to riprap a dike built to protect an oil field from being flooded by a dam which had necessitated the relocation of the highway and railroad. Oil produced in that oil field moved in interstate commerce. The Court held that the employees producing the rock bore such a close and immediate tie to the integrated effort to effectuate the continued movement of oil in interstate commerce, that they were engaged in the production of goods for commerce and thus under the coverage provisions of the Act.

Congress expressly dealt with that situation in its restrictive amendments of 1949 to the Fair Labor Standards Act. The following conclusive statement appears in the House Managers' Report interpreting the Conference Report agreeing to amendments to the Fair Labor Standards Act, House Report No. 1453, 81st Congress, 1st Session, at page 15, under date of October 17, 1949:

> "The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production: * * *
>
> "2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (Schroeder v. Clifton, 153 F. 2d (C.A. 10)); cert. den., 328 U.S. 858, 66 S. Ct. 1351."

It thus appears that Congress expressly considered the Schroeder case, restricted that branch of the decision which had applied the Act to quarry employees, and left stand the other portions of the decision, hereinbefore quoted, holding the Act inapplicable to employees quarrying rock and preparing local materials for use upon interstate transportation lines.

Thus, in determining the scope of the words "engaged in the production of goods for commerce", it

would appear that Congress has indicated an intent to restrict rather than liberalize the coverage provisions. E.g., *Tobin v. Pennington Winter Const. Co.*, 198 F. 2d 334, 337 (C.A. 10 1952).

(c) Interpretations placed upon the Act by the Administrator

The Administrator's interpretation of the coverage provision of the Act, adopted May 15, 1941, is revealing, for he and his staff were then in a better position than we are today to sense the intent of this administration-sponsored legislation. His Release G-162 categorically disclaims coverage of the same class of employees who are here being considered. Paragraph VI thereof states:

> "Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair or reconstruction of essential instrumentalities of commerce do not become subject to the Act merely by reason of the use to which such products are put. * * * Such employees are not 'engaged in commerce' since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used. Neither are such employees engaged in producing goods for commerce."

In March of 1945 the Administrator completely reversed his position and by applying "The House That

Jack Built" technique, has endeavored to bring such off-the-road employees within the coverage of the Act as being engaged in the production of goods for commerce.

The foundation upon which the Administrator based his complete reversal of interpretation is the so-called "ice cases". It is submitted that the rationale of the "ice cases" is obviously not applicable to off-the-road employees who furnish materials locally for local use. *Chapman v. Home Ice Company of Memphis,* 136 F. 2d 353, 355 (C.A. 6 1943), cert. den. 320 U.S. 761, 64 S. Ct. 72; *Atlantic Co. v. Walling,* 131 F. 2d 518, 520 (C.A. 5 1942), affirming *Fleming v. Atlantic Co.,* 40 F. Supp. 654, 661 (N.D. Ga. 1951); *Hamlet Ice Co. v. Fleming,* 127 F. 2d 165, 167, 170 (C.A. 4 1942), cert. den., 317 U.S. 634, 63 S. Ct. 29. In the *Chapman* case Circuit Judge Simons cautioned that the ice cases were decided on the basis of their precise facts, saying:

> "We are not unmindful of the fact that a rationalization based upon the doctrine of necessity may under *'The House that Jack Built' technic,* lead to absurdity and end by ignoring all practical distinction between 'what is parochial and what is national.'" (Emphasis added).

In the Atlantic cases, the first of the so-called "ice cases", Circuit Judge Hutcheson stated that the question was:

> "* * * whether employees of defendant who are engaged in the manufacture, sale and deliveries of ice to the railroads, the Fruit Growers Express,

and to trucks for refrigeration of interstate freight shipments are covered by the Act * * *"

The precise question had been practically foreclosed by the well-known provision in Section 1(3) of the Interstate Commerce Act of 1887, as amended in 1906, 34 Statutes at Large, 584, Chapter 3591, 49 U.S.C.A., Section 1(3), pages 11 and 46, that interstate transportation includes:

"* * * all services in connection with the * * * refrigeration or icing * * * of property transported."

The initial ice case decision, *Fleming v. Atlantic Co.*, supra, at page 661, quoted and relied upon:

"* * * this statutory recognition of the interstate character and necessity of such icing service * * *"

In the *Hamlet Ice Company* case, supra, where it was conceded that:

"* * * the ice was bought for shipment to other states"

Circuit Judge Soper based the decision upon the fact that:

"* * * the cars iced at Hamlet are for the most part through freights, moving between Florida and New York. The Ice Company had knowledge at the time the ice is produced that it will move in interstate commerce."

In his opinion below Judge Kolodner recognized that the Administrator's assertion of coverage was

based upon the "ice cases". We submit that close scrutiny of those cases will disclose that they are no more stable as the supporting keystone of the Administrator's position than one would expect ice to be. The distinguishing fact in the "ice cases" which establishes their vital difference from this case is that in them the goods were transported in interstate commerce and were produced with the knowledge that they would be so transported.

II

Petitioner's off-the-road employees are not engaged "in commerce" nor are they so intimately related thereto as to be in practice and in legal contemplation a part of it.

The Court of Appeals ignored Respondent's argument that Petitioner's employees are engaged *in* commerce. He urges that under the cases of *Overstreet v. North Shore Corporation,* 318 U.S. 125, 63 S. Ct. 494 (1943); *Pedersen v. J. F. Fitzgerald Construction Co.,* 318 U.S. 740, 63 S. Ct. 558 (1943), modified and petition for rehearing denied, 318 U.S. 742, 63 S. Ct. 558 (1943); and *Fitzgerald v. Pedersen,* 324 U.S. 720, 65 S. Ct. 892 (1945), Petitioner's employees are so intimately related to interstate commerce "as to be in practice and in legal contemplation a part of it." Further, that the "practical considerations" are that their work is "vital to the proper functioning of these structures as instrumentalities" of commerce because without their service these instrumentalities would not

be open to the passage of goods and persons across state lines. *Overstreet v. North Shore Corporation,* supra, 318 U.S. 125, 63 S. Ct. 494 (1943), at pages 128-130.

However, it is to be noted that in *McLeod v. Threlkeld,* 319 U.S. 491, 63 S. Ct. 1248 (1943), this Court declined to accede to the argument that the conception of "in commerce" be extended *beyond* the employees engaged in actual work upon the transportation facilities. The cases relied upon below by the Respondent do not support this contention for extension of coverage. In *Ritch v. Puget Sound Bridge and Dredging Co.,* 156 F. 2d 334 (C. A. 9 1946); *Laudadio v. White Construction Co.,* 163 F. 2d 383 (C. A. 2 1947); and *Bennett v. Loftis Co.,* 167 F. 2d 286 (C. A. 4 1948), all cited heretofore by the Respondents as "a consistent line of decisions of the courts of appeals holding employees engaged in maintenance, repair and improvement of instrumentalities to be "in commerce"—the employees though physically off the instrumentality under consideration were working *on* a particular interstate facility or project in the sense of devoting their time and efforts to a particular facility or project. The end to be accomplished was the construction of the instrumentality itself. There is certainly no similarity between such a situation, and that with which we are here concerned. For example, Petitioner's employees who are employed in the mixing plant are not devoting their time and efforts toward the building or repair of some interstate facility; they are preparing a standard bituminous concrete mixture which may be used on public interstate roads, industrial parking lots, or private tennis courts.

The Administrator claimed no coverage under the "in commerce" provision in 1941, as indicated by Release G-162, supra, and, despite his pronouncements in this case, it would seem that the respondent has not at any time shown any real confidence in his position. In fact, Judge Forman, as late as July, 1949, in *McComb v. Trimmer*, supra, at page 567, refers to the fact that, "Obviously—and the plaintiff [McComb] *concedes* it—since the defendants' employees are not engaged directly upon, or associated with, any instrumentality of commerce itself, as in the foregoing cases, they are not engaged 'in' commerce". (Emphasis added) The "foregoing cases" are: *Overstreet v. North Shore Corporation*, 318 U.S. 125, 63 S. Ct. 494 (1943); *Pedersen v. J. F. Fitzgerald Const. Co.*, 318 U.S. 740, 742, 63 S. Ct. 558 (1943); *Walling v. McCrady Const. Co.*, 156 F. 2d 932 (C.A. 3 1946); *Walling v. Patton-Tully Transp. Co.*, 134 F. 2d 945 (C. A. 6 1943); *Bennett v. Loftis Co.*, 167 F. 2d 286 (C.A. 4 1948); and an oral opinion in *McComb v. Carter*, D.C. 8 W.H. Cases, 498.

In the instant case the government's attorneys likewise "conceded" before District Judge Follmer that Petitioner's off-the-road employees were not engaged "in" the production of goods for commerce.

And as recently as July 17, 1952, in *Tobin v. Johnson*, 198 F. 2d 130 (C.A. 8 1952) at page 132, Chief Judge Woodbrough said: "Plaintiff does not contend, *as he could not* in view of the decided cases, that defendants' employees are 'engaged in commerce' but only that they are 'engaged in the production of goods for commerce,' ". (Emphasis added).

III

Judicial expression has been overwhelmingly in support of Petitioner's position.

Inasmuch as this Court has granted certiorari in the case of *Adam Thomas v. Hempt Bros.*, 371 Pa. 383, 89 A. 2d 776 (1952) No. October Term, 1952 and will hear argument thereon immediately following this case, we shall not discuss in detail the opinion of the Supreme Court of Pennsylvania. We do, however, suggest that the opinion of Mr. Justice Jones of that court constitutes a well-reasoned critique of the opinion of Judge Kalodner.

In addition to the opinion in the *Hempt Bros.* case, supra, which reflects the views of the Petitioner herein, we respectfully refer to other judicial expression which has been overwhelmingly in support of our position:

Walling v. Craig, 53 F. Supp. 479 (D.C. Minn. 1943) which involved off-the-road employees who operated bituminous plants;

Wiley v. Stewart Sand and Material Co., 206 S.W. 2d 362 (Kans. Cy. C. A. Mo.), which involved employees who produced rock for use upon the highways and railroad beds within the State of Missouri;

Crabb v. Welden Bros., 65 F. Supp. 369 (S. D. Iowa 1946), which involved employees of a com-

pany quarrying and processing stone for use in repair and maintenance for interstate highways;

E. C. Schroeder Company, Inc. v. Clifton, et al., 153 F. 2d 385 (C.A. 10 1946), cert. den., 328 U. S. 858, 66 S. Ct. 135 (Judge Bratton's opinion), with reference to quarry workers quarrying rocks for use upon interstate transportation lines, both railroads and highways;

McComb v. Trimmer, 85 F. Supp. 565 (D.C. N.J. 1949), which involved employees of a company quarrying and processing stone for use in repair and maintenance of interstate highways;

Barbe v. Cummins Construction Company, 49 F. Supp. 168 (D.C. Md. 1943); involving employees of a concrete mixing concern which produced no goods which are shipped across state lines;

Ramos v. Puerto Rico Cement Corporation, Civil Case No. 4583, 10 C.C.H. Labor Cases, 63000 (March 1, 1946), involving employees who produced cement which was used by others in the repair and maintenance of instrumentalities of interstate commerce.

Further, bearing in mind that Congress rejected coverage in industries *affecting* interstate commerce in favor of the more restricted coverage provisions, it is significant that the Labor Management Relations Act, 1947, June 23, 1947, C. 120, Sec. 1, 61 Stat. 136; 29 USCA 141, which governs industries which "*affect*" commerce and which has been generally recognized as an expression of the widest extension of the commerce

power, has not been applied to intrastate activities such as those of Petitioner's off-the-road employees. The National Labor Relations Board has refused to entertain jurisdiction in cases dealing with operations essentially local in character: *Harvey M. Hanawalt, d/b/a Hanawalt Brothers,* Dec 16, 1948, case No. 21-RC-459, 80 N.L.R.B. No. 196; *D'Harris Brick and Tile Co.,* March 3, 1949, case No. 39-RC-23, 81 N.L.R.B. No. 173; *Okeelanta Sugar Co-Operative,* March 9, 1949, case No. 10-RC-373, 81 N.L.R.B. No. 200.

IV

The sweep of the injunction as affirmed by the court below is too broad.

The Court below answered the Petitioner's objection that the sweep of the injunction is too broad by referring to the language of the injunction. But, if Petitioner is to be guided by the language of the decision of the District Court as to which of its employees are covered by the Act, it is confronted by the sweeping assertion that since "eighty-five and one-half percent" of its "total output was directed toward the improvement of various interstate facilities, all of the employees of the Defendant [Petitioner] are definitely within the scope of the statute."

As was contended before the Court of Appeals, we believe that the fundamental error in the opinion of the District Court lies in the fact that the Court chose to view Petitioner's over-all operation rather than

focus its inquiry upon the work performed by the individual employee: *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S. Ct. 332 (1943) at page 337. District Judge Follmer said *all* of Alstate's employees were covered at a time even though he found, for example, that at the Naginey Plant, approximately twenty (20%) per cent of the output went into private work (R-9). Did Judge Follmer mean that, even those employees who worked on private work during a work week were covered? Should the Petitioner be obliged to act at its peril in determining which of his employees are engaged in interstate commerce or in the production of goods for commerce, *within the meaning of the Act?* District Judge Follmer's opinion, we believe, is susceptible of interpretation that, since eighty-five and one-half per cent of the total output goes into interstate facilities, *all employees* of Alstate are covered *all* of the time. We do not believe that such a conclusion was intended or would be legally sound, but we do contend that the opinion erroneously suggests a wide departure from the Act and cases decided thereunder which require that the determination of coverage be made upon an individual employee basis.

CONCLUSION

The present effort by the Respondent to extend the scope of the Fair Labor Standards Act of 1938 cannot be supported by the actual language of the statute, the legislative history and underlying considerations, the interpretations and rulings of the Ad-

ministrator, or the overwhelming judicial expression relating thereto.

We are not here concerned with an *exemption* from coverage; we are considering the basic question of *coverage* itself. On that issue, we submit that Chief Judge Woodbrough in *Tobin v. Johnson,* 198 F. 2d 130 (C.A. 8 1952), erred in relying apparently upon Mr. Justice Murphy's statement from *A. H. Phillips, Inc. v. Walling* 324 U.S. 490, 65 S. Ct. 807 (1945), that:

> "The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' * * * Any *exemption* from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress." Id. 493.

Here, the "plain meaning of the statutory language and the intent of Congress" with reference to coverage of Petitioner's employees leave no room for doubt. From a physical standpoint, purely local business is involved and the product of the labor neither moves in interstate commerce nor does it have that immediacy of participancy in interstate commerce as to bring Petitioner's employees within the coverage of the Act.

The language of this Court in *Western Union Telegraph Co. v. Lenroot,* 323 U.S. 490, 508, 65 S. Ct. 325 (1945), while involving another point, is particularly appropriate:

"But had it (Congress) determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process. After all this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of interpretation to an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation."

The judgment should be reversed.

Respectfully submitted,

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No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1952

ALSTATE CONSTRUCTION COMPANY, PETITIONER

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	16

CITATIONS

Cases:

Atlantic Co. v. *Walling*, 131 F.2d 518	10, 13, 14
Bennett v. *Loftis Co.*, 167 F.2d 286	8, 14
Borden Co. v. *Borella*, 325 U.S. 679	12
Chapman v. *Home Ice Co. of Memphis*, 136 F.2d 353, certiorari denied, 320 U.S. 761	10, 13
Fitzgerald Co. v. *Pedersen*, 324 U.S. 720	7
Hamlet Ice Co. v. *Fleming*, 127 F. 2d 165, certiorari denied, 317 U.S. 634	10, 13
Hansen v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144 P.2d 896	10
Kennedy v. *Silas Mason Co.*, 334 U.S. 249	16
Kirschbaum Co. v. *Walling*, 316 U.S. 517	12
Laudadio v. *White Const. Co.*, 163 F.2d 383	8
Lewis v. *Florida Power & Light Co.*, 154 F.2d 751	10, 13
McLeod v. *Threlkeld*, 319 U.S. 491	12, 13
Murphy v. *Reed*, 335 U.S. 865	16
Overnight Motor Co. v. *Missel*, 316 U.S. 572, rehearing denied, 317 U.S. 706	12
Overstreet v. *North Shore Corp.*, 318 U.S. 125	7
Pedersen v. *J. F. Fitzgerald Construction Co.*, 318 U.S. 740, modified and petition for rehearing denied, 318 U.S. 742	7
Powell v. *United States Cartridge Co.*, 339 U.S. 497	11
Ritch v. *Puget Sound Bridge and Dredging Co.*, 156 F.2d 334	8
Roland Electrical Co. v. *Walling*, 326 U.S. 657	12
E. C. Schroeder v. *Clifton*, 153 F.2d 385, certiorari denied, 328 U.S. 858, rehearing denied, 329 U.S. 821	13, 14
Southern United Ice Co. v. *Hendrix*, 153 F.2d 689	10, 13
Thomas v. *Hempt Bros.*, 371 Pa. 383, 89 A.2d 776	7, 15, 16
Tobin v. *Johnson*, 11 W.H. Cases 38 (not yet officially reported) petition for certiorari pending, No. 330, this Term	11, 13, 14

Cases—Continued

	Page
Walling v. *Jacksonville Paper Co.*, 317 U.S. 564, affirming 128 F.2d 395	11
Walling v. *McGrady Const. Co.*, 156 F.2d 932, certiorari denied, 329 U.S. 785	14
Western Union Telegraph Co. v. *Lenroot*, 323 U.S. 490	9

Federal Statutes:

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. Supp. V, 201:	
Sec. 3(b)	2
Sec. 3(j)	2, 15
Sec. 7(a)	3

Miscellaneous:

General Statement as to Coverage, issued July 1947, 29 CFR, 1947 Supp. 776; 12 F.R. 4583, sec. 776.7, par. (c)	10
House Manager's Report, H. Rep. No. 1453, 81st Cong., 1st Sess.	15
Interpretative Bulletin as to General Coverage, issued May 1950, 29 CFR, c. V, Part 776, sub-part A, May 1950; 15 F.R. 2925	10
Release A-14, issued by the Administrator, Wage and Hour Division, United States Department of Labor, March 1945 (1944-1945 WH Man. p. 1497)	10
Webster's New International Dictionary, unabridged, 1948 ed. p. 984	10

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MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 7-17) is reported in 95 F. Supp. 585. The opinion of the court of appeals (R. 86-90) is reported in 195 F. 2d 577.

JURISDICTION

The judgment of the Court of Appeals was entered April 9, 1952 (R. 91). Petition for rehearing was denied May 5, 1952 (R. 92). On July 11, 1952, the time for filing a petition for writ of certiorari

was extended to August 29, 1952. The petition was filed August 27, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Are employees who regularly engage in the preparation and hauling of materials and road-mixes to be used in the repair, reconstruction, extension, and maintenance of interstate highways, roads and railroads "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act?

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 as amended by the Fair Labor Standards Amendments of 1949 (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; 29 U.S.C., Supp. V, 201) are:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several states or between any State and any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in pro-

ducing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

SEC. 7 (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Petitioner is engaged in resurfacing existing highways, public roads, and streets used to a substantial extent by interstate traffic (R. 29, 38). As the district court found, petitioner's "road work, covered by contracts with the Commonwealth of Pennsylvania and many of its political subdivisions, involved no completely original construction; it consisted entirely in some form of resurfacing of previously existing roads, either interstate as such or connecting with an interstate system, with the slight exception involved in the straightening of old road lines * * *" (R. 15). "A typical case would be a through highway carrying a State and frequently a United States highway number. It may originally have been dirt, but it was none the less a part of an interstate system of highways." (R.

15-16.) Resurfacing frequently also included patching and other preliminary repair on the existing roadbeds (R. 66), eliminating hills (R. 13), and widening curves and shoulders.

The trial court found that eighty-five and one-half percent (85.5%) of petitioner's total output "was directed toward the improvement of various interstate facilities" (R. 17). Petitioner's contracts with the State and its political subdivisions totaled $825,025.83, or over 70 percent of its total business of $1,172,276.70 during the three and one-half years examined (computed from table in stip., R. 31). Over 15 percent of petitioner's business ($177,589.47 in the same period) was with interstate railroads and industrial concerns (*ibid.*). Petitioner's "industrial and railroad work was in each cited instance done for the improvement of the facilities of concerns engaged in interstate commerce" (R. 15). Less than 15% of the business, characterized as "private" work, apparently involved no interstate activity (R. 15).

Petitioner's headquarters is at Harrisburg, Pennsylvania, and it conducts its operations through its plants at Hanover, Cressona, and Naginey (R. 27) as "component parts of an integrated unit" (R. 16). Except for the relatively small amount of "private" work, each of the three plants participated substantially in each of the types of business listed above in each of the years examined (R. 31).

In the resurfacing operations undertaken by all three of petitioner's plants, the ingredients are

combined to produce the material applied on the existing roadbeds, a bituminous concrete substance known as amesite (R. 28). The close integration which the district court found between the production of this material at the three plant sites and its application to the roads is illustrated in many ways. All of petitioner's work in applying the resurfacing materials, whether for the State, its political subdivisions, commercial, or industrial customers, is pursuant to contracts calling for a completed result involving both the labor and the materials (R. 29). Except for such commercial customers as may happen expressly to require a different mixture, all of the amesite is mixed in accordance with specifications required by the Pennsylvania Department of Highways, and the State has inspectors present at the plant sites at all times to assure conformity with the specifications (R. 70). Most significantly, it is stipulated that "Except for certain types of material used for patching purposes in the winter season, practically all of the bituminous concrete material produced at Alstate's three plants is applied to highways, roads, etc. immediately after production" (R. 40). Moreover, the testimony of the employees reveals that the plant sites were the headquarters of the employees working on the roads as well as those mixing the amesite (R. 48, 54), and, indeed, there was no segregation but rather considerable interchange between employees performing their duties at the plants and at the road sites (R. 48-56, 60-62).

It is stipulated that there was no segregation at

any of the three plants among petitioner's employees mixing the bituminous concrete materials or applying them according to the interstate or local uses to which those materials were put (R. 39). Nor was there any segregation among truck drivers attached to the Cressona and Naginey plants as to the interstate or local uses of the materials at the job sites to which they hauled them (R. 12, 39-40).

Both courts below held that the employees in question were within the coverage of the Act, rejecting petitioner's contention that a distinction should be drawn between so-called "on the road" and "off the road" employees. The district court concluded "that the various plants of the defendant were all component parts of an integrated unit, eighty-five and one-half percent of whose total output was directed toward the improvement of interstate facilities, and that all of the employees of the defendant are definitely within the scope of the statute" (R. 11, 16-17). The judgment enjoined petitioner from violating the overtime requirements of the Act with respect, specifically, to "any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act" (R. 22-23).

ARGUMENT

The decision below correctly applies the principles established by this Court's decisions and does not conflict with the decision of any United States court of appeals. In these circumstances, although the case involves an important question as to the application of the Act, it does not present

any problem which may not be resolved by applying principles already well settled. In view, however, of the fact that it is in conflict with the decision of the Pennsylvania Supreme Court in *Thomas* v. *Hempt Bros.*, 371 Pa. 383, 89 A. 2d 776, we do not oppose certiorari.

1. In holding that employees performing work specifically for and essential to the maintenance, repair and improvement of instrumentalities of interstate commerce are covered by the Act, whether such work be "on the road" or "off the road," the decision below correctly applied principles well established by decisions of this Court and other courts of appeals. In *Overstreet* v. *North Shore Corporation*, 318 U.S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U.S. 740, modified and petition for rehearing denied, 318 U.S. 742; and *Fitzgerald Co.* v. *Pedersen*, 324 U.S. 720, employees engaged in the maintenance, repair, reconstruction and improvement of interstate instrumentalities were held to be "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' " *Overstreet*, 318 U.S. at 130; *Pedersen*, 318 U.S. 740, and 324 U.S. at 724-725. The "practical considerations" underlying this ruling were that their work is "vital to the proper functioning of these structures as instrumentalities of interstate commerce" (see *Overstreet*, 318 U.S. at 128, 130) and "because without their service these instrumentalities would not be open to the passage of goods and persons across the state lines" (*ibid.*).

These principles have been applied by a con-

sistent line of decisions of the courts of appeals holding employees engaged in maintenance, repair and improvement of interstate instrumentalities to be "in commerce" even though "off the road". See *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 337 (C.A. 9) (holding the Act applicable to "white collar" workers physically removed from the instrumentality on which the construction was being done); *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C.A. 2) (holding the Act applicable to estimators and draftsmen performing preparatory paper work preliminary to the actual construction work on the instrumentality); *Bennett* v. *Loftis Co.*, 167 F. 2d 286 (C.A. 4) (holding covered a watchman employed to guard the construction of a new bridge which had never carried interstate traffic and was some distance removed from the highways then being used to carry such traffic, but which when completed was to connect with roads leading to interstate highways).

The work of the employees in the instant case in preparing the very material specified in the construction contract for repair of existing instrumentalities of interstate commerce is no less vital a part of the commerce than the work of the employees in the above cited cases. Just as the white collar employee who performs drafting, estimating and other necessary preliminaries to repair of facilities of commerce is "in commerce," so is the manual worker who, as part of an integrated operation, prepares the material which his co-workers

apply to the facilities of commerce. The preparation and hauling of materials and road mixes needed for specific road repairs are just as indispensable to the proper functioning of the instrumentalities of commerce as is the physical application of that material to the roads. In the instant case this is particularly true. There was ample support in the undisputed evidence for the trial court's finding that the functions at petitioner's mixing plants were "all component parts of an integrated unit" (R. 16). The vital part the mixing operation plays in the completed project is constantly recognized in petitioner's day-to-day dealings with the State. This function is considered so important as to be a matter of detailed specification in the road repair contract and requires the constant presence of State inspectors at petitioner's plants to assure proper observance of these specifications (R. 70).

Accordingly, we think the employees in question were "in commerce." But if not "in commerce," they were certainly engaged in "production of goods for commerce," as the court below held. If, as this Court has held, the maintenance and repair of instrumentalities of interstate commerce constitute an integral part of such commerce, it would seem to follow, literally and logically, that the production of materials for that specific purpose is production of goods "*for* commerce" (emphasis supplied). The word "for" is a word "of ordinary speech" to be given all the meaning it has "in ordinary intercourse in this context." See *Western*

Union Telegraph Co. v. *Lenroot*, 323 U.S. 490, at 503. The popular understanding and dictionary definition of the word "for" includes "to serve as, or as part of; to supply the need of; in order to effect." *Webster's New International Dictionary*, 1948 Ed., p. 984. As the road material here is stipulated to have been produced, directly and specifically, "for use in the construction, extension, repair, resurfacing, reconstruction, and maintenance of existing [interstate] highways" (R. 39), it follows that its production is "for commerce" within the plain ordinary meaning of those words.[1]

This construction follows long-standing decisions of courts of appeals dating back to 1942 in the so-called "ice cases". *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5), which "affirmed throughout" the "thoughtful and carefully worked out opinion" of District [now Circuit] Judge Russell, 40 F. Supp. 654, N.D. Ga.; followed by the Sixth Circuit in *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, certiorari denied, 320 U.S. 761. To the same effect see *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5); *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C.A. 6); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144 P. 2d 896 (1944).

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[1] This has long been the position of the Administrator. Release A-14, issued March 1945, 1945 W. H. Man. 1497, and repeated in his General Statement as to the Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, issued July 1947, 29 CFR, 1947 Supp., Part 776, (12 F.R. 4583), Section 776.7 paragraph (c); incorporated in Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, 29 C.F.R., c. V, Part 776, subpart A, May 1950 (15 F.R. 2925).

See also *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied, 317 U.S. 634. These principles were most recently applied in the decision of the Eighth Circuit in *Tobin* v. *Johnson*, 11 WHC 38, (not officially reported), petition for certiorari pending, No. 336, this Term, which followed the decision in this case to hold that "off the road" quarry workers producing material for use in the repair and maintenance of interstate instrumentalities were engaged in the production of goods for commerce.

Petitioner's attempted distinction between "off the road" and "on the road" employees finds no support in the decisions of this Court or other federal courts. As this Court re-emphasized in its most recent decision construing this Act, "the Act declared its purpose in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality * * *. Where exceptions were made, they were narrow and specific. * * * Such specificity in stating exemptions strengthens the implication that employees not thus exempted * * * remain within the Act." *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516-517.

There is plainly no exemption in the Act for employees who work "off the road." And neither the statutory language nor its purposes warrant any such distinction. Thus this Court has repeatedly held the Act applicable to employees who do not physically work on the instrumentality of interstate commerce or physically handle the goods pro-

duced for commerce. See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, affirming the ruling of the Fifth Circuit applying the "in commerce" coverage to those who "write the letters, keep the books [off the road]," as well as to those who "load and unload or drive the trucks [on the road]." 128 F. 2d 395, 398; *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, rehearing denied, 317 U.S. 706, holding an "off the road" rate clerk for an interstate motor carrier to be "engaged in commerce." See also cases cited *supra*, p. 8. Similarly in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, and *Borden Co.* v. *Borella*, 325 U.S. 679, the "production of goods for commerce" coverage was applied to custodial and maintenance employees who had no physical contact with the goods which moved in commerce. The employees held covered in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, were engaged in repairing electrical motors and equipment for use in the production of other goods to be shipped in commerce and did not physically handle such goods so shipped. In all of these cases the crucial consideration was not the physical location of the worker or the work done, but its direct, intimate and necessary relationship to commerce or the production of goods for commerce.

2. In support of its contention that the decision below is "contrary to the decisions of this" Court (petition, p. 11), petitioner cites only *McLeod* v. *Threlkeld*, 319 U.S. 491, holding the Act inapplicable to a cook employed by an independent contractor to prepare meals for railroad maintenance employees. The *McLeod* decision plainly has no

pertinence here. It was because the cook "supplies the personal needs" only of the employees, that is, food which is "consumed apart from their work," as this Court expressly stated, that the Act was held inapplicable to him. 319 U.S. at 497. The reasons for that decision, therefore, can have no application to employees who furnish the very material specified in the construction contract for the maintenance of the interstate instrumentality itself. In short, the cook in the *McLeod* case did not produce goods to supply the needs of commerce, but only to supply "the personal needs" of the employees "apart from their work."

The decision below does not conflict with that of any other court of appeals. On the contrary, it accords with a consistent line of decisions of at least four circuits—the Third, Fifth, Sixth, and Eighth. Both circuits which have ruled on the specific issue of coverage of so-called "off the road" workers producing materials for the repair and maintenance of interstate instrumentalities (the court below here and the Eighth Circuit) have reached the same result by unanimous decisions. See *Tobin* v. *Johnson*, 11 WHC 38, petition for certiorari pending, No. 336, this Term. And at least two other circuits have expressly adopted the rationale applied by the court below. *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5); *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5); *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C.A. 6), certiorari denied, 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C.A. 6); see also *Hamlet Ice Co.* v.

Fleming, 127 F. 2d 165 (C.A. 4), certiorari denied, 317 U.S. 634.

In the case of *E. C. Schroeder* v. *Clifton*, 153 F. 2d 385 (C.A. 10), certiorari denied, 328 U.S. 858, rehearing denied, 329 U.S. 821, on which petitioner relies as presenting a conflict among the circuits, only one of the three participating Judges rejected the rationale of the above decisions. The opinion from which petitioner quotes as the opinion of "the court" (petition, p. 13), is the opinion of Judge Bratton only. 153 F. 2d at 387, 391. Judge Huxman dissented, voting to affirm the judgment of the district court that the Act applied to employees producing gravel for railroad and road construction (*id.*, at 394). The deciding vote was cast by Judge Phillips, who explicitly refrained from controverting the rationale of the *Atlantic Co.* case and the other similar decisions,[2] stating that in his

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[2] Judge Phillips' opinion rested on the assumption that the *Schroeder* case involved "new construction" which was outside the scope of the Act. *Cf.* the later and more carefully reasoned decisions holding that construction of new segments of existing roads and railroads is not original construction but is covered by the Act as repair and maintenance work. *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785, and *Bernett* v. *Loftis Co.*, 167 F. 2d 286 (C.A. 4). Thus the result reached by Judge Phillips, though contrary to the result reached in the instant case, does not reflect a conflict in principle warranting certiorari, in view of the fact that neither the petition in this case, nor in the *Johnson* or *Hempt Bros.* cases, presents any issue regarding the proper classification of construction as original on the one hand or as repair and reconstruction on the other. It may be noted that this Court denied certiorari in the *Schroeder* case, 328 U.S. 858, rehearing denied, 329 U.S. 821, despite the reliance of the cross petitioner in that case upon the conflict between Judge Bratton's opinion and the Fifth Circuit's opinion in the *Atlantic Co.* case (see No. 1237, October Term, 1945, petition of *Clifton, et al.*, pp. 8-10).

view the doctrine of those cases had no application to the facts of the *Schroeder* case and resting his decision on a wholly different ground. 153 F. 2d at 391, 393.[3]

Although the rule in the federal courts thus appears settled, the decision of the Supreme Court of Pennsylvania in *Thomas* v. *Hempt Bros.*, 371 Pa. 383, 89 A. 2d 776, expressly declined to follow the decision of the Third Circuit in the instant case. The single employee there involved was engaged in producing and handling sand, stones and cement, loading those materials on trucks, and giving directions for their delivery to the Pennsylvania Turnpike, an airport, a railroad, and military depots.

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[3] The 1949 Amendments to the Fair Labor Standards Act, to which petitioner refers (Pet., p. 14) as supporting the *Schroeder* decision, have no bearing on the issue here presented. The House Managers' Report, H. Rep. No. 1453, 81st Cong., 1st Sess., from which petitioner quotes, refers only to that part of the *Schroeder* decision relating to the quarrying of rock for construction of a dike to protect from flooding an oil field producing oil for commerce. Coverage of this work depended upon the portion of Section 3(j) of the Act covering "any process or occupation necessary to the production" of goods to be shipped in commerce. This phrase of Section 3(j) of the Act was amended by the 1949 Amendments so as to read "any closely related process or occupation directly essential to the production." Neither the House Manager's report nor anything else in the legislative history made any reference to the issue of coverage of production of materials for use in the repair of interstate roads and instrumentalities, which is the issue here presented.

Coverage in the instant case rests not upon the ground that the work in question is an occupation "necessary to" or "closely related and directly essential to" production of other goods for interstate commerce, but on the ground that the preparation of materials specifically for use in repair and maintenance of instrumentalities of commerce is a part of such commerce or is production directly "for commerce," without reference to the amended phrase.

While the facts are not entirely clear from the opinion, the decision would appear basically in conflict with the decision below, as the Pennsylvania court expressly recognized. We understand that a petition for certiorari will be filed in that case. We think that if this Court is to consider the issues on which the Pennsylvania court differed with the court below, it is important that it have before it the present case, which comes up on a much more complete record after trial in an action in which the Government agency responsible for the administration and enforcement of the Act is a party.[4]

Accordingly, we do not object to the granting of the writ in the present case.

Respectfully submitted,

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OCTOBER, 1952.

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[4] The *Hempt* decision was rendered solely on the pleadings without trial. Hence it is not impossible that this Court, should it grant certiorari in the *Hempt* case, might after argument find it necessary to remand the case for "amplification of the record." *Kennedy* v. *Silas Mason Co., et al.*, 334 U.S. 249, 257; *Murphy* v. *Reed*, 335 U.S. 865.

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No. 296

Supreme Court of the United States

OCTOBER TERM, 1952

ALSTATE CONSTRUCTION COMPANY, *Petitioner*

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NATIONAL SAND & GRAVEL ASSOCIATION AS AMICUS CURIAE

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INDEX

	Page
Statute Involved	2
Question Presented	3
Statement of the Case	3
The Interest of the Association	5
Argument	6
I. The statutory language and the statutory scheme expressed in that language preclude the interpretation adopted by the court below	7
A. The Act sets up two tests for coverage	7
B. The court below and the Administrator assert a new composite coverage	8
C. The legislative history, reflected in the plain wording of the Act, makes the interpretation adopted by the court below wholly untenable	10
II. Respondent's present interpretation of the Act, which is a reversal of prior long-standing interpretations, is not supported by the cases on which he relies	15
III. The basic unsoundness of the interpretation adopted by the court below appears from the incongruities and inconsistencies which necessarily result from its practical application	23
A. The Schroeder case and the legislative history of the 1949 Amendments	23
B. The Administrator's existing interpretations are not consistent with the principle urged in this case	26
C. The Administrator presently applies his interpretation in a limited field but, if accepted, its scope is subject to indefinite extension	29
Conclusion	31

CITATIONS

Cases:

Atlantic Co. v. *Walling*, 131 F. 2d 518 (5th Cir. 1942) 9, 19, 20
Armour & Co. v. *Wantock*, 323 U.S. 126 7
Chapman v. *Home Ice Co. of Memphis*, 136 F. 2d 353 (6th Cir. 1943), *cert. denied*, 320 U.S. 761 .....19, 20
Cleveland etc. R.R. v. *Backus*, 154 U.S. 439 14

Page

Convey v. *Omaha National Bank*, 140 F. 2d 640 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 7
Engebretzen v. *E. J. Albrecht Co.*, 150 F. 2d 602 (7th Cir. 1945) 14
Enterprise Box. Co. v. *Fleming*, 125 F. 2d 897 (5th Cir. 1942), *cert. denied*, 316 U.S. 704 20
Fleming v. *Atlantic Co.*, 40 F. Supp. 654 (N.D. Ga. 1941), *aff'd*, 131 F. 2d 518 (5th Cir. 1942) 9, 19, 20
Hamlet Ice Co. v. *Fleming*, 127 F. 2d 165 (4th Cir. 1942, *cert. denied*, 317 U.S. 634 ..... 18, 19, 20
Hansen v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144 P. 2d 896 (App. Cal. 1944) 19
Johnson v. *Dallas Downtown Development Co.*, 132 F. 2d 287 (5th Cir. 1942), *cert. denied*, 318 U.S. 790 14
Johnson v. *Tobin*, 100 F. Supp. 491, *rev'd*, 198 F. 2d 130 (8th Cir. 1952) 1, 2, 3, 5, 10, 15, 22
Kirschbaum v. *Walling*, 316 U.S. 517 ..... 10, 14
Lewis v. *Florida Power & Light Co.*, 154 F. 2d 751 (5th Cir. 1946) 20
Mabee v. *White Plains Publishing Co.*, 327 U.S. 178 ..... 26, 29
McComb v. *Carter*, 8 Wage Hour Cases 498 (E.D. Va. 1948) 22
McComb v. *Trimmer*, 85 F. Supp. 565 (D. N.J. 1949) 9, 22
McComb v. *Turpin*, 8 Wage Hour Cases 408 (D. Md. 1948) .. 22
McLeod v. *Threlkeld*, 319 U.S. 491 ..... 7, 10, 13
Murphey v. *Reed*, 335 U.S. 865 30
Nashville, C. & St. L. Ry. v. *Wallace*, 288 U.S. 249 14
NLRB v. *Jones & Laughlin S. Corp.*, 301 U.S. 1 12
New Mexico Public Service Co. v. *Engel*, 145 F. 2d 636 (10th Cir. 1944) 21
Overstreet v. *North Shore Corp.*, 318 U.S. 125 13
Powell v. *U. S. Cartridge Co.*, 339 U.S. 497 14
Ramos v. *Puerto Rico Cement Corp.*, 5 Wage Hour Cases 956 (D. P.R. 1946) 22
Reading R.R. v. *Pennsylvania*, 82 U.S. 284 14
Roland Electrical Co. v. *Walling*, 326 U.S. 657 ..... 14, 22
E. C. Schroeder Co. v. *Clifton*, 153 F. 2d 385 (10th Cir. 1946), *cert. denied*, 328 U.S. 858 ..... 9, 14, 21, 23, 24-25
Schroepfer v. *A. S. Abell Co.*, 138 F. 2d 111 (4th Cir. 1943) .. 14
Schulte v. *Gangi*, 328 U.S. 108 7
Southern United Ice Co. v. *Hendrix*, 153 F. 2d 689 (6th Cir. 1946) 19
Stoike v. *First National Bank*, 290 N.Y. 195, 48 N.E. 2d 482 (1943) 9
10 East 40th Street Building v. *Callus*, 325 U.S. 578 13
Thomas v. *Hempt Brothers*, 371 Pa. 383, 89 A. 2d 776 (1952) . 1, 2, 3, 5, 10, 15, 21, 22
Walling v. *Craig*, 53 F. Supp. 479 (D. Minn. 1943) 22
Walling v. *Jacksonville Paper Co.*, 317 U.S. 564 ..... 10, 13, 14

Page

Wiley v. *Stewart Sand & Material Co.*, 206 S.W. 2d 362 (Kansas City Court of Appeals, Mo. 1947) 22
Western Union Telegraph Co. v. *Lenroot*, 323 U.S. 490 9, 10, 14, 18, 23
United States v. *Darby*, 312 U.S. 517 14

Statutes and Legislative Materials:

83 Cong. Rec. 7433-4, 75th Cong. 3d Sess. 12, 13
83 Cong. Rec. 9166-9173, 75th Cong., 3d Sess. 11, 12
Fair Labor Standards Act of 1938, as amended by Fair Labor Standards Amendments of 1949, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; 29 USC 203, 207(a) ..... 2 *et passim*
Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65 12-13
H.R. Rep. No. 1453 on H.R. 5856, 81st Cong., 1st Sess. (1949) 13, 24
H.R. Rep. No. 2738 on S. 2475, 75th Cong., 3d Sess. (1938) .. 10

Miscellaneous:

29 Code Fed. Reg. Part 776 (supp. 1947) 16
29 Code Fed. Reg. Part 776 (1949 ed., supp. 1951) 18
Interpretative Bulletin No. 5, Release R-113, Wage and Hour Division of the Department of Labor, December 2, 1938 15
Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, Part 776, Subpart A, General, May 1950, 29 Code Fed. Reg. Part 776, (1949 ed., supp. 1951) ..17, 18, 20, 21, 26-29
Reorganization Plan No. 6 of 1950, 64 Stat. 1265, 16 F.R. 8147 6
1944-5 Wage-Hour Manual, Bureau of National Affairs (BNA) 15, 17, 21
Wage-Hour Release G-162, May 15, 1941 17
Wage-Hour Release R-1789, April 20, 1942 21
Wage-Hour Release A-14, March 13, 1945 ..... 17, 21

Supreme Court of the United States

OCTOBER TERM, 1952

No. 296

ALSTATE CONSTRUCTION COMPANY, *Petitioner*

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NATIONAL SAND & GRAVEL ASSOCIATION AS AMICUS CURIAE

The National Sand & Gravel Association is the national trade association of the sand and gravel industry. The Association, having obtained and filed written consent of counsel for the Petitioner and of the Solicitor General, files this brief *amicus curiae* because of the extraordinary importance to its members of the issue of interpretation of the Fair Labor Standards Act presented to the Court in this case, in *Thomas* v. *Hempt Brothers,* No. 410, and also present in *Johnson* v. *Tobin,* No. 336, pending in the Court on petition for certiorari.

The opinion of the District Court in this case (R. 7-15) is reported at 95 F. Supp. 585. The opinion of the Court of Appeals (R. 66-70) is reported at 195 F. 2d 577. The opinion below in the *Hempt* case is reported at 371 Pa. 383, 89 A. 2d 776, those in the *Johnson* case at 100 F. Supp. 491 and at 198 F. 2d 130.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949 (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; 29 U.S.C. 203, 207(a)) are as follows:

Sec. 3. As used in this Act—

* * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

* * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any

other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * *

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

QUESTION PRESENTED

This brief is directed to argument of a single question, present in this case, in *Thomas* v. *Hempt Brothers* and in *Johnson* v. *Tobin*. That question is:

> Whether workmen who are engaged in quarrying locally, or in producing from materials quarried or purchased locally, construction materials such as bituminous concrete, gravel and rock, sold and delivered within the state for use by others in local reconstruction, repair and maintenance of interstate highways or other facilities of interstate transportation, are engaged in "production of goods for commerce" within the meaning of the Fair Labor Standards Act, as amended.

STATEMENT OF THE CASE

The facts, so far as relevant to the issue considered in this brief, are as follows:

Respondent brought an action to enjoin Petitioner, Alstate Construction Company (Alstate), from con-

tinuing alleged violations of overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter called "the Act") (R. 1-3).

Alstate is engaged solely in the Commonwealth of Pennsylvania in the production, sale, distribution and application of a bituminous concrete material known as amesite. The amesite is produced at three plants located in the State of Pennsylvania. Except for some asphalt material used at one of the three plants, substantially all the materials used in the production of amesite are quarried or manufactured and purchased in Pennsylvania (R. 8).

The amesite produced by Alstate is disposed of to Pennsylvania customers for use in Pennsylvania (R. 20-21). The greater part of the product is used for constructing, reconstructing, resurfacing and repairing interstate highways. In many cases, Alstate supplies the material under contracts which provide for furnishing both the material and labor necessary for a particular construction, reconstruction or repair job, and in these cases employees of Alstate actually apply the material to the highways. In other cases, Alstate simply sells the material to the Commonwealth of Pennsylvania, its political subdivisions and others for use by them in constructing, reconstructing, resurfacing and repairing highways and other interstate facilities (R. 20-22). Such material may be sold f.o.b. Alstate's plants, or delivered in its own trucks or in the trucks of contract carriers which Alstate pays (R. 10).

The court below held, and it is not now disputed, that some employees of Alstate engaged in the actual reconstruction, resurfacing and repairing of existing

interstate highways and similar instrumentalities are engaged in commerce and covered by the Act (R. 8). The controversy is as to employees not engaged in such activities but employed apart from them in the production of amesite and related activities.

The court below held that all such "off the road" employees, in producing material which is used to repair and maintain the surface of instrumentalities of commerce, are engaged "in the production of goods for commerce" (R. 69), and that they are, therefore, covered by the Act.

As already indicated, the issue is present also in *Thomas* v. *Hempt Brothers,* No. 410 in this Court, and in *Johnson* v. *Tobin,* No. 336 in this Court. In those cases only "off the road" employees are involved. There were no employees engaged in actual repair and reconstruction activities.[1] There can be no question that the issue common to the three cases, as we have presented it, is before this Court.

THE INTEREST OF THE ASSOCIATION

Although there are other issues present in this case, this brief will be directed to the single question stated above. The Association omits discussion of other questions, not because those questions are unimportant for its members, but because in this brief it desires to focus attention on one vital question of general importance to its members, the validity of an interpretation of the key provisions of the Act with respect to coverage which it regards as fundamentally erroneous. That interpretation brings under the Act essen-

[1] In Johnson v. Tobin it was stipulated that none of the products involved were placed by the defendants upon any instrumentality in interstate commerce. (Printed Record, No. 336, p. 26).

tially local operations of local production for local use, disregarding the Congressional intent to leave such operations to local regulation.

ARGUMENT

The decision of the court below, reflecting the position urged by the Administrator,[2] is that employees engaged in local production of construction materials for sale and use locally are nevertheless subject to the Act if the goods are used for repair, reconstruction and maintenance of interstate highways or other instrumentalities of commerce. Respondent urges that the literal terms and plain meaning of the statutory language and controlling decisions of the courts require this result.

It is the purpose of this brief to bring to the Court's attention the fundamental lack of merit in Respondent's position.

Respondent's interpretation actually flies in the teeth of the statutory language. As applied to the practical situation here under consideration, it completely disregards the statutory scheme establishing dual bases for coverage—one for employees engaged in commerce and the other for employees engaged in production of goods for commerce. In so doing, it blandly ignores the Congressional intent which gave rise to this statutory scheme and which has maintained it on amendment and reenactment. And, as might be expected in view of these defects, the

[2] The term "Administrator" is used throughout this brief to designate the official having responsibility for administration of the Fair Labor Standards Act. For an explanation of the transfers and delegations of authority as a result of which suits are brought by the Secretary of Labor, see Section 4 of the Act; Reorganization Plan No. 6 of 1950, 64 Stat. 1265; 16 F.R. 8147.

Respondent's interpretation conflicts with controlling principles enunciated in the decisions of the Court. Moreover, disregard of the statutory scheme in this area leads to incongruous results inconsistent with the Administrator's own valid interpretations applicable to other questions of coverage.

I

THE STATUTORY LANGUAGE AND THE STATUTORY SCHEME EXPRESSED IN THAT LANGUAGE PRECLUDE THE INTERPRETATION ADOPTED BY THE COURT BELOW

A. THE ACT SETS UP TWO TESTS FOR COVERAGE

The critical coverage language reads: "engaged in commerce or in the production of goods for commerce" (Section 7(a)). The distinct character of the coverage asserted by these two phrases is established. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 131; *Schulte* v. *Gangi*, 328 U.S. 108, 119.[3]

The scope of the "in commerce" coverage was authoritatively defined in *McLeod* v. *Threlkeld*, 319 U.S. 491, 494. It covers "every employee in the 'channels of interstate commerce' as distinguished from those who merely affected that commerce."

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[3] The Court of Appeals for the Eighth Circuit stated the point succinctly in Convey v. Omaha National Bank, 140 F. 2d 640, 643-4 (1943), *cert. denied*, 321 U.S. 781:

> "While it is arguable that the establishment of a dual standard is not in consonance with the economic realities which prompted the enactment of the Fair Labor Standards Act, we cannot disregard the definitive language employed by Congress in framing the Act. 'When by definition Congress differentiated between "commerce" and "production of goods for commerce", we may not assume it was wholly without purpose.' Stoike v. First National Bank, supra."

We are not here concerned with employees held by the court below to be covered by the "in commerce" test. The issue is with respect to application to off-the-road employees not engaged in commerce, of the "production of goods for commerce" test, which includes, through the definition of "produced" (Section 3(j)), "any closely related process or occupation directly essential to" such production.

B. THE COURT BELOW AND THE ADMINISTRATOR ASSERT A NEW COMPOSITE COVERAGE

The holding of the court below is framed in terms of the "production of goods for commerce" coverage, the second of the statutory tests, but it is in truth based on a wholly new, composite test, devised by the Administrator.

Although the court below did not spell out the rationale of its conclusion that all off-the-road employees were engaged in "production of goods for commerce," the basis for the conclusion can be ascertained from the arguments advanced by the Administrator and the reasoning of the cases on which the court relied. The crux of the matter is in the meaning of the phrase "for commerce." The Administrator breaks that phrase in two and gives to one or the other or to both words a meaning they clearly do not have in context. Thus, he maintains because the statutory definition of "commerce" itself includes the word "commerce," it must be concluded that the definition includes everything heretofore known as constituting commerce in the Constitutional sense, that is, commerce which Congress has power to regulate; it therefore means, and is synonymous with, all instrumentalities of commerce, as such, regardless of what limiting words or phrases may be used with it in context. See

Fleming v. *Atlantic Co.*, 40 F. Supp. 654, 660 (N.D. Ga. 1941), *aff'd* in 131 F. 2d 518 (5th Cir. 1942). And the dictionary is consulted for definitions of the word "for" which will give to it the widest possible scope, with the assertion that, since the word is a word of ordinary speech, it is "to be given *all* the meaning it has 'in ordinary intercourse in this context.'" See, Memorandum for Respondent on Petition for Writ of Certiorari in this case, pages 9-10. Compare, *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, at 503, which is cited as authority although it omits the crucial word "all" which the Administrator uses.

The net effect of the process of "interpretation" which the Administrator follows is to end up with an entirely new coverage in which "production of goods for commerce" becomes, in the Administrator's own words, "production of goods [necessary] for [instrumentalities of] commerce;" or, "production of goods [to serve as or as a part of, to supply the need of, in order to effect] commerce." Phrased either way, the result of the invention is a composite coverage which, on practical application, reaches a wide area untouched by either test of coverage considered separately.[4]

Viewed broadly, the result is also to read into the

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[4] The composite coverage sought to be achieved by the "necessary to" phrasing of the new coverage was considered and pointedly rejected by the New York Court of Appeals in its carefully reasoned opinion in Stoike v. First National Bank, 290 N.Y. 195, 48 N.E. 2d 482, 485-486 (1943). Judge Bratton exposed the fallacy inherent in the second phrasing of the composite coverage urged by the Administrator in E. C. Schroeder Co. v. Clifton, 153 F. 2d 385, 388-390 (10th Cir. 1946); and Judge Forman used even more emphatic language to dispose of the "for commerce" theory in McComb v. Trimmer, 85 F. Supp. 565, 567, 569 (D. N.J. 1949).

Act an "affecting commerce" test in the face of Congressional rejection of exactly that test, and of expression of Congressional intention not to exercise the full scope of its Constitutional powers in fixing labor standards.

C. THE LEGISLATIVE HISTORY, REFLECTED IN THE PLAIN WORDING OF THE ACT, MAKES THE INTERPRETATION ADOPTED BY THE COURT BELOW WHOLLY UNTENABLE

Extended discussion of legislative history seems unnecessary. The Court, we believe, is fully aware of its significance to the coverage language of the Act. *Kirschbaum* v. *Walling*, 316 U.S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *McLeod* v. *Threlkeld*, 319 U.S. 491; *Western Union* v. *Lenroot*, 323 U.S. 490. We consider it, therefore, only for its direct bearing on the new question of interpretation common to the *Alstate, Hempt* and *Johnson* cases, which is here presented to the Court.

The bills which went to conference contained only the "affecting commerce" test. The significance of the shift to dual coverage, of which one branch is "production of goods for commerce," unexplained by the conference Report,[5] appears clearly from the debates on the conference bill.

The debates, insofar as they relate to what Congress intended (as distinguished from what it thought it had the Constitutional power to do), were directed to the proposition that the concern, in covering the production industries into the Act, was to reach these only to the extent that they were part of a *"system which shipped goods in interstate commerce."* See especially

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[5] See H.R. Rep. No. 2738 on S. 2475, 75th Cong., 3d Sess., pp. 29-30 (1938).

Senator Borah, who was one of the chief proponents of exercising the commerce power so as to cover activities connected with production of goods. 83 Cong. Rec. 9166-9173, 75th Cong., 3d Sess. How better than by use of the phrase "production of goods for commerce" could Congress have framed the over-all idea expressed by the interchange between Senators Bailey and Borah on the floor of the Senate when the conference bill was debated? (83 Cong. Rec. 9167, 75th Cong., 3d Sess.)

> "MR. BAILEY. * * * Commerce is intercourse. It is not industry. I think the Senator will agree with me about that. I have heard him argue to that effect in this Chamber many times.
>
> MR. BORAH. I do not disagree with the Senator, that if an activity is within intrastate commerce, we may not deal with it. However, if the activity is interstate commerce, and the wage earner is engaged in work *which results in shipment in interstate commerce,* that is a wholly different question.
>
> MR. BAILEY. The Senator is coming down to commerce. Let us keep the question between us clear. Suppose I am working in a cotton mill in North Carolina. The cotton mill sells goods across the State line. Does that fact put me in commerce? If it does, that is a new doctrine in the Senate, and a new doctrine in America. The railroad worker is in commerce, because the railroad is an instrumentality of commerce. However, I think the Senator from Idaho, whose learning in the matter of the Constitution and the law is extraordinary and admirable and is profoundly respected by me, under all circumstances, as he knows, will agree that it has always been held that the man in the mill is not in commerce just because the mill sells

its goods in commerce. Am I not correct in that statement?

MR. BORAH. Certainly, if the Senator limits the question as he does. However, if the man in the mill is engaged in producing a commodity which is shipped, and *the entire operation of production and shipment is one transaction,* as was held in the Jones and Laughlin case, then I maintain that it is in interstate commerce.

MR. BAILEY. Does the Senator contend that the man is working in interstate commerce?

MR. BORAH. *If he is working in the production of goods which are being prepared for interstate commerce, and it is part of the system to ship the goods in interstate commerce, the whole transaction is interstate commerce,* as was held by the court in the Jones and Laughlin case."
(Emphasis supplied.)

Against such a background, the key to the scope and meaning of the statutory phrase "production of goods for commerce" is clear. The exercise of the commerce power under that phrase was to reach the activities in the production industries only if those activities were part of a total effort intended ultimately to place goods in the stream of commerce.

Other factors in the specific background of the coverage provisions give content to the legislative purpose. Congress had immediately in mind the then-recent decision in the *Jones & Laughlin* case (301 U.S. 1) in which its power over unfair labor practices "affecting commerce" had been sustained in its application to the *productive processes* of industry. 83 Cong. Rec. 7433-4, 9166, 75th Cong., 3d Sess. Congress also had before it the case history of the phrase "in commerce" from such acts as the Federal Em-

ployers' Liability Act which regulated the common carrier industries (Act of April 22, 1908, 35 Stat. 65, § 1). See, 83 Cong. Rec. 7434, 75th Cong., 3d Sess.; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132; and, see, *10 East 40th Street Building* v. *Callus*, 325 U.S. 578, 579.

From its earliest decisions the Court has recognized that the selection of language asserting a dual basis of coverage—one in terms of activity "*in* commerce", the other in terms of "*production of goods for* commerce"—in the law as enacted, is the articulation of an unmistakable intent to establish two branches of coverage with distinct practical functions in the operation of the law, and together asserting a narrower coverage than would an "affecting commerce" standard.[6]

The Court has recognized, likewise, that the statutory scheme serves to effectuate Congressional intent, clearly expressed in the legislative history, to leave untouched essentially local activities. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 570, citing legislative history; *10 East 40th Street Building* v. *Callus*, 325 U.S. 578, 582. The fundamental purpose to leave local operations to the states was emphatically reaffirmed when Congress enacted the 1949 amendments to the Act. H.R. Rep. No. 1453 on H.R. 5856, 81st Cong., 1st Sess. 14-15 (1949).

Both this Court and the lower appellate courts have, in the empirical process demanded for application of the coverage phrases, consistently recognized and applied the principle that coverage under the "production for commerce" test is necessarily founded on

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[6] The Court observed in McLeod v. Threlkeld, 319 U.S. 491, 493, "The selection of the smaller group was deliberate and purposeful."

the actual or anticipated *movement of goods in commerce as the end result of the productive process* of which a particular employee is a part. See, e.g., consideration of legislative history and holdings in *United States* v. *Darby*, 312 U.S. 100, 113, 117; *Kirschbaum* v. *Walling*, 316 U.S. 517, 520-523; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567-580. In *Powell* v. *U. S. Cartridge Co.*, 339 U.S. 497, 513, the Court described as a "jurisdictional fact" the circumstance that "at the time the [goods] were produced they were intended for interstate transportation." And see, *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 663-664; *Western Union* v. *Lenroot*, 323 U.S. 490, 503, 506; *E. C. Schroeder Co.* v. *Clifton*, 153 F. 2d 385, 388 (10th Cir. 1946), *cert. denied*, 328 U.S. 858; *Engebretzen* v. *E. J. Albrecht Co.*, 150 F. 2d 602 (7th Cir. 1945); *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (4th Cir. 1943); *Johnson* v. *Dallas Downtown Development Co.*, 132 F. 2d 287 (5th Cir. 1942), *cert. denied*, 318 U.S. 790.

It is abundantly clear from the foregoing discussion that "commerce", as used in the Act, does not mean commerce in the sense of everything within the scope of Federal power to regulate, including instrumentalities of commerce[7] and all activities affecting commerce. Nor does "for" mean "to serve as or as a part of, to supply the need of, in order to effect". To interpolate thus the statutory phrases is to wipe out at one stroke the clearly defined dual bases of coverage

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[7] Even when the scope of Federal power over commerce is in issue the physical facilities or instrumentalities of transportation, communication or transmission are not treated as themselves being "commerce". See, *e.g.*, Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 267; Cleveland etc. R.R. v. Backus, 154 U.S. 439, 445; Reading R.R. v. Pennsylvania, 82 U.S. 284, 294.

established by the Act, and substitute a test not distinguishable from the "affecting commerce" test specifically rejected by Congress.

Commerce in the Act means transportation or communication or transmission as a function or operation or movement interstate. The coverage established by the "production of goods for commerce" test extends, whether directly or indirectly, only to those employee activities which, when they take place, are intended to contribute toward placing goods ultimately into the stream of commerce.

In this case and in the *Thomas* and *Johnson* cases, this essential condition to coverage is lacking. The only goods involved never move in the stream of commerce. The employees who produce them are not covered by the Act.

II

RESPONDENT'S PRESENT INTERPRETATION OF THE ACT, WHICH IS A REVERSAL OF PRIOR LONG-STANDING INTERPRETATIONS, IS NOT SUPPORTED BY THE CASES ON WHICH HE RELIES

For some seven years after the passage of the Act the Administrator interpreted it as not applying to off-the-road employees of the kind with which we are concerned. In a series of interpretations between 1938 and 1943, he repeatedly recognized that the plain meaning of the statute was that production of goods for commerce meant production for movement in commerce.

Thus, Interpretative Bulletin No. 5, Release R-113, originally issued December 2, 1938 contained the following (see BNA 1944-5 Wage-Hour Manual, p. 19):

> "2. The wage and hour provisions of the Act are applicable to employees 'engaged in (interstate)

commerce or in the production of goods for (interstate) commerce.' Employees are engaged in the production of goods '*for* commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the act. * * *"[8]

On July 15, 1939, in answer to a direct inquiry made by the Executive Secretary of the Association, Mr. Bauh, then Chief of the Opinion Section, stated for the General Counsel:

"Your letter raised the question whether the Fair Labor Standards Act, a copy of which is enclosed, covers employees engaged in the production of sand and gravel which is sold and used within the state of production in the repair or reconstruction of interstate highways. In his letter to Mr. Egan, Inspector Hill took the position that employees engaged in such activities were entitled to the benefits of the statute.

"This office has carefully considered the matter and is of the opinion that under the circumstances outlined the employees in question are outside the scope of the Act. They are not 'engaged in commerce' since their operations are of a local nature and are distinct from the operations of the repair and maintenance of interstate highways. Furthermore they are not engaged 'in the production of

[8] Compare later version, 29 Code Fed. Reg. § 776.7(b) (supp. 1947).

goods for commerce,' since the goods they produce do not move across state lines. Neither, in our opinion, are they engaged in a 'process or occupation necessary to the production' of goods (for commerce) within the meaning of Section 3(j) of the Act."

On May 15, 1941, the Administration in a formal release directed specifically to this industry (G-162, see BNA 1944-5 Wage-Hour Manual, p. 36) stated (Par. VI):

> "Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair, or reconstruction of essential instrumentalities of commerce *do not become subject to the Act merely by reason of the use to which such products are put.* * * * Such employees are not 'engaged in commerce' since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used. Neither are such employees engaged in producing goods for commerce. * * *" (Emphasis supplied.)

As late as November, 1943, L. Metcalfe Walling, Administrator of the Wage-Hour Division, in response to a question directed to him by the Association, stated that Release G-162 "still represents the views of the Division."

It was not until Release A-14, promulgated on March 13, 1945 (see 29 Code Fed. Reg. § 776.17(c), 1949 ed., supp. 1951) that the Administrator reversed his position. It is worthy of note that in some of his presently effective interpretations he still appears to recognize that coverage under the "production of

goods for commerce" test depends upon whether goods are sold or shipped in commerce. See Interpretative Bulletin, General Coverage[9] (cited herein by this short-form title), 29 Code Fed. Reg. §§ 776.15(b) and 776.16(b).[10]

The Administrator justified his original change of mind and still seeks to support his interpretation on the basis of the so-called "Ice cases". The decisions in those cases do not support his interpretation. Rather, they are wholly consistent with the preceding analysis. *Hamlet Ice Co.* v. *Fleming*, 127 F.2d 165 (4th

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[9] Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, Part 776, Subpart A, General, May 1950, 29 Code Fed. Reg. Part 776 (1949 ed., supp. 1951).

[10] The Administrator recognizes that he is precluded by Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, from now urging that what a carrier does in transporting or transmitting goods in transit in interstate commerce is "production of goods for commerce." Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.15(b). It is of significance in evaluating the position taken by the Administrator in the instant cases, to observe that if the Court had accepted the interpretation proposed by the Administrator in the Lenroot case, he would now be in a position, without resort to the "for commerce" theory now urged, to test the coverage of off-the-site employees here under the "production of goods for commerce" phrase. In other words, if the Court had gone along with the Administrator's theory on the interpretation of "produced" in the Lenroot case, all activities of persons whose work might be found to be "closely related" or "directly essential" to carrying of goods in their interstate movement (but not the employees here involved, see *infra* pages 23-24) would have been covered into the Act under the "production of goods for commerce" test. If this had occurred, all distinction, for practical purposes, between the "in commerce" test and the "production for commerce" test would have been wiped out. This, the Court noted expressly and refused to do. 323 U.S. at p. 504.

Cir. 1942), *cert. denied*, 317 U.S. 634; *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (5th Cir. 1942); *Chapman* v. *Home Ice Co. of Memphis*, 136 F. 2d 353 (6th Cir. 1943), *cert. denied*, 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (6th Cir. 1946); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144 P. 2d 896 (App. Cal. 1944).

In the *Hamlet* case, an ice company in North Carolina sold substantial quantities of ice to three interstate carriers by rail—the Fruit Growers Express Co., the Seaboard Railroad, and the Railway Express Agency. The ice was used in icing cars and shipments. In the words of the court (p. 167), "The Ice Company has knowledge at the time the ice is produced that it will move in interstate commerce." The Ice Company, however, contended that because *it* sold the ice within North Carolina, that *it* therefore engaged in no interstate commerce, and the later interstate commerce was irrelevant because it was by another, who was the ultimate consumer. The Court refused to regard the flow of production as thus divisible into separate stages wholly insulated from each other. Congress, the Court stated, was concerned with the production of goods "for" commerce (127 F. 2d at 169), and this ice was such goods. The Court added (*ibid.*):

> "The Supreme Court had no occasion to define the precise limits of the phrase 'production for commerce', but there can be no doubt that it relates to all goods that are expected to be transported in interstate commerce whether they are to be shipped by the maker or by some one else."

The technical argument that because the purchaser was the ultimate consumer the ice ceased entirely to be "goods", the Court simply refused to take seriously.

The same consideration was present in the *Atlantic* case. There, although the court generally rested its decision upon an approval of the opinion in the *Hamlet* case, it said (131 F. 2d at 521):

> "* * * The fact of which appellant makes so much, that the ice produced for, and being transported in, interstate commerce has the inherent defect of perishability and is, in the course of its use, consumed, is entirely without effect, we think, upon the proposition that ice is goods, is produced for commerce, and moves in commerce."

The *Chapman* and later cases were based upon similar facts, and relied upon the *Hamlet* and *Atlantic* decisions.

The significant fact in the ice cases, therefore, is that the ice was produced for commerce, and moved in commerce. There would be nothing about the cases at all out of the ordinary except for the rather ingenious argument that the instrumentality of commerce, by being the consumer, actually insulated the producer against this movement in commerce. That argument having failed, the case was simply the ordinary one, now commonplace, where title to goods changes in the course of the movement out of the state. No court has had difficulty in concluding that the vagaries of the title are not determinative. *Enterprise Box Co.* v. *Fleming*, 125 F. 2d 897 (5th Cir. 1942), *cert. denied*, 316 U.S. 704. See Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.20(d).

The Administrator relies also on *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (5th Cir. 1946). This and other electric power cases involve a wholly different principle. As it is produced locally the power is applied to the active functioning of the transporta-

tion or transmission facility through a direct physical connection and enters into the actual operation of transporting or transmitting. It is in truth an operating part of the movement of commerce. The Tenth Circuit Court correctly observed in *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (1944), that electric power is as much a functional element in the movement of goods as bridges and tracks and is to be tested by the "in commerce" coverage when it is utilized in the operations of instrumentalities of commerce. The Administrator himself has, since 1942, regarded the employment involved in this situation as covered under the "in commerce" test. Administrative Interpretation, Release R-1789, April 20, 1942, see BNA 1944-5 Wage-Hour Manual, p. 24; Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.11.

The issue of coverage of employees such as those here involved has been in litigation ever since the promulgation of Release A-14 in 1945.[11] The analogy of the ice and electric cases has been repeatedly urged. It was first presented in *E. C. Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (10th Cir. 1946), *cert. denied*, 328 U.S. 858, and emphatically rejected in an opinion written by Judge Bratton.[12] It was similarly rejected in *Mc-*

[11] Compliance with the Administrator's interpretation, such as appears in Thomas v. Hempt Brothers, indicates not acquiescence in the interpretation but unwillingness to run the very substantial risks created by non-compliance. *Cf.* dissenting opinion in that case, 371 Pa. at 396, 89 A. 2d at 782, printed record in No. 410, p. 28.

[12] Judge Phillips concurred in the conclusion that the employees involved in the branch of the case presenting the Administrator's new theory were not covered but did so upon the ground that the construction involved was new construction. The third judge dissented. See the discussion of this case, *infra* pages 23-25.

Comb v. *Trimmer*, 85 F. Supp. 565 (D.N.J. 1949); *McComb* v. *Turpin*, 8 Wage-Hour Cases 408, 412, 413 (D. Md. 1948); *Wiley* v. *Stewart Sand & Material Co.*, 206 S. W. 2d 362 (Kansas City Court of Appeals, Mo. 1947); and *Ramos* v. *Puerto Rico Cement Corp.*, 5 Wage-Hour Cases 956 (D. P.R. 1946); see, also, *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn. 1943). The Supreme Court of Pennsylvania rejected it again in the *Thomas* case.

It was not until after this Court's decision in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, that the Administrator's position was finally accepted by any judicial authority. *McComb* v. *Carter*, 8 Wage-Hour Cases 498 (E.D. Va. 1948). The Court in that case apparently relied, as the court below and the Eighth Circuit in the *Johnson* case clearly did, upon the language of the *Roland* opinion that coverage does not require the employee to be employed in the production of an article which itself becomes the subject of commerce. Of course, in so relying, those courts ignored one of the fundamental distinctions which we have pointed out. The employees in the *Roland* case admittedly did not produce goods which moved in commerce. The sole question was whether they were covered under the indirect test contained in the definition of production because engaged in an occupation "necessary for" production by others of goods which would move in commerce. Until there is production by someone of goods that move in commerce, that test, and the language of the *Roland* case relating thereto cannot come into play.[13]

[13] The opinion of the Supreme Court of Pennsylvania in Thomas v. Hempt Brothers suggests that a different rationale was adopted by the court below in this case. It interprets that opinion as

In this case, that fundamental requirement is not met.

III

THE BASIC UNSOUNDNESS OF THE INTERPRETATION ADOPTED BY THE COURT BELOW APPEARS FROM THE INCONGRUITIES AND INCONSISTENCIES WHICH NECESSARILY RESULT FROM ITS PRACTICAL APPLICATION

Consideration of the practical implications of the interpretation adopted by the court below demonstrates its basic unsoundness. It leads immediately to capricious results, clearly inconsistent with Congressional intention. The Administrator's existing interpretations disclose that there is here presented a new and broad principle of coverage, the potential scope of which is subject to no definite limits.

A. THE SCHROEDER CASE AND THE LEGISLATIVE HISTORY OF THE 1949 AMENDMENTS

In considering the 1949 Amendments to the Act, Congress had before it the questions of coverage presented in *E. C. Schroeder Co.* v. *Clifton,* 153 F. 2d 385 (10th Cir. 1946), *cert. denied,* 328 U.S. 858, discussed *supra* page 21. That case involved two distinct questions of coverage, one relating to activities of employees producing crushed stone and gravel used for

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meaning that since goods in commerce were hauled over the highways repaired and maintained with materials furnished by the off-the-road employees, those employees were covered because engaged in an occupation closely related and directly essential to the production of goods. This rationale cannot stand in view of this Court's holding in Western Union Telegraph Co. v. Lenroot, *supra* note 10, that activities of employees of a carrier in transporting goods in commerce are not production within the meaning of the Act.

relocated portions of an interstate railroad and highway. As to these employees, coverage was claimed on the principle here in issue. A majority of the court held that they were not covered.

The other branch of the case related to similar employees producing stone to be used in construction of a dike protecting a producing oil field from flooding by the waters of a lake. A majority of the court held that these employees were covered because engaged in an occupation necessary for production of the oil which was to move in commerce.

In discussing the amendment of the definition of "production" (Section 3(j)) which narrowed the indirect coverage by changing the language "any process or occupation necessary to production" to read "any closely related process or occupation directly essential to production", the Managers on the part of the House made the following statement with reference to the *Schroeder* case, H.R. Rep. No. 1453, 81st Cong., 1st Sess. 15 (1949):

> "The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:
>
> * * *
>
> "2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (*Schroeder* v. *Clifton*, 153 F. (2d) 385 (C.C.A. 10); cert. den., 328 U.S. 858)."

The report does not refer directly to the employees involved in the other branch of the *Schroeder* case, whom the court had held were not covered. But the express disapproval of coverage for the employees involved in one branch of the case, because their activities were too remote from production for commerce to sustain coverage, necessarily implies approval of the other branch, which rejected the interpretation here in question.

Absurd results follow from a different conclusion. The absurdity is best illustrated by a specific example. Suppose an industrial plant producing for interstate commerce and a road over which some interstate traffic moves are located beside the same non-navigable stream, the waters of which are undermining the roadway and the plant's property. The public authority having jurisdiction of the road and the industry each constructs a retaining wall, the former to support the roadway, the latter to protect its plant. The Congressional intent expressed in 1949 is clear that employees supplying gravel or concrete to build the wall protecting the plant property are not covered because they are engaged in an essentially local business and their activities are not closely related or directly essential to production of goods in the plant. Under the rule adopted below, the employees supplying materials for the retaining wall supporting the roadway would be covered.

All the employees are employed by the same essentially local business to perform identical operations. The functional relationship between their work and the operations of plant and road are identical. The physical location of their activities and their legal relationships with plant and public authority are identi-

cal. Is it reasonable to interpret the Act to provide for coverage in one case and not the other?

B. THE ADMINISTRATOR'S EXISTING INTERPRETATIONS ARE NOT CONSISTENT WITH THE PRINCIPLE URGED IN THIS CASE

It is well settled that if employees regularly and recurrently produce any goods for commerce, those employees are covered by the Act. This is direct coverage. That the amount of goods produced for commerce is negligible does not affect the coverage. *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178. See Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. §§ 776.3 and 776.15(a).

A different rule applies, says the Administrator, where there is no production for commerce and the issue is whether employees are engaged in a closely related process or occupation directly essential to production. This is indirect coverage. Thus, the Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.19(b), states with respect to coverage of local businesses selling to producers for commerce:

> "(1) Many local merchants sell to local customers within the same State goods which do not become a part or ingredient of goods produced by any of such customers. Such a merchant may sell to his customers, including producers for commerce, such articles, for example, as paper towels, or record books, or paper clips, or filing cabinets, or automobiles and trucks, or paint, or hardware, not specially designed for use in the production of other goods.
>
> "Where such a merchant's business is essentially local in nature, selling its goods to the usual miscellany of local customers without any particular intent or purpose of aiding production of

other goods for commerce by such customers, the local merchant's employees are not doing work both 'closely related' and 'directly essential' to production, so as to bring them within the reach of the Act, merely 'because some of the customers * * * are producing goods for interstate [or foreign] commerce.' Therefore, if they do not otherwise engage 'in commerce' or in the 'production' of goods for commerce, they are not covered by the Act." (Footnotes omitted)

The Administrator contends that the employees here involved are engaged in production of goods for commerce under the direct test. But he does not apply the rule that if production for commerce is regular and recurrent, employees are covered no matter how small the quantity involved. Rather he applies the rule applicable to employees covered indirectly. In discussing the type of coverage here involved in his Interpretative Bulletin, he spells out essentially the same test as that used for local activities, generally, quoted above (29 Code Fed. Reg. § 776.21(b)(3)):

"This does not, however, necessarily mean that the production of such materials [sand, gravel, cement, etc.] within a State is *always* production 'for' commerce when the materials are used in the same State for the maintenance, repair, or improvement of highways or other instrumentalities carrying interstate traffic. In determining whether the production is actually 'for' commerce in a situation where there is no reason to believe that the goods will leave the State, a practical judgment is required. Some illustrations may be helpful.

* * *

"On the other hand, there are situations where materials or other goods used in maintaining, repairing, or reconstructing instrumentalities of commerce are produced and supplied by local materialmen under circumstances which may require the conclusion that the goods are not produced 'for' commerce. Thus, a materialman may be engaged in an essentially local business serving the usual miscellany of local customers, without any substantial part of such business being directed to meeting the needs of highway repair or reconstruction. If, on occasion, he happens to produce or supply some materials which are used within the State to meet such highway needs, and he does so as a mere incident of his essentially local business, the Administrator will not consider that his employees handling or working on such materials are producing goods 'for' commerce. This is, rather, a typically local activity of the kind the Act was not intended to cover. The same may be said of the production of ice by an essentially local ice plant where the only basis of coverage is the delivery of ice for the water cooler in the community railroad station. The employees producing ice in the ice plant for local use would not by reason of this be covered as engaged in the production of goods 'for' commerce." (pp. 24-25)

Could anything be clearer than that the coverage here asserted is, in fact, a coverage based upon application of the indirect test of "closely related" and "directly essential" rather than the direct test of actual participation in production? These interpretations make it clear that what the Administrator is actually doing here is, as we contend, creating a combination test of coverage by which he reads into the "in commerce" branch of coverage the "closely related"

and "directly essential" test applicable only to production for commerce cases.[14]

C. THE ADMINISTRATOR PRESENTLY APPLIES HIS INTERPRETATION IN A LIMITED FIELD BUT, IF ACCEPTED, ITS SCOPE IS SUBJECT TO INDEFINITE EXTENSION

The Administrator presently applies the interpretation which is involved here to a limited number of commodities used to construct instrumentalities of commerce, telephone and telegraph poles, crushed rock, concrete, cross ties, pipe, bridge timbers and similar items, and, as already pointed out, he apparently will apply it only in cases where the production is substantial. Interpretative Bulletin, General Coverage, 29 Code Fed. Reg. § 776.21(b).

Once the principle has been established, the limits of the coverage appear open to indefinite extension. The principle would seem applicable not merely to construction materials but to other articles necessary for activities which are regarded as "in commerce."

There is no obstacle to elimination of the requirement that production be substantial as well as regular. There is no clear basis for concluding that the principle is limited to construction materials. It may apparently be extended to any articles required and used by employees engaged "in commerce". Furthermore,

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[14] The Administrator may point out that the prohibition of shipment in commerce of "any goods" contained in Section 15(a) is not here applicable, since no goods are shipped in commerce, and conclude that there is no inconsistency in applying the quantitative test rejected in Mabee v. White Plains Publishing Co., 327 U.S. 178. Of course, application of Section 15(a) is not the test of coverage under the Act. It is inapplicable in all indirect coverage cases. The argument, if made, is merely a further recognition that we are dealing here with a newly-created type of indirect coverage.

it may apply not only to the producer but to the merchant who, by handling the goods, also becomes a producer. The local merchant who sells to the trucking company, or the electrical company, or the radio station would no longer be subject to the closely related and directly essential test, but is himself a producer for commerce whose employees are covered. The intention to leave essentially local business to local regulation has been set at naught.

It is now settled that employees engaged in new construction are neither "in commerce" nor engaged in the "production of goods for commerce". *Murphey* v. *Reed*, 335 U.S. 865. If "commerce" means instrumentalities of commerce and "for" means "to supply the need of, in order to effect", it would appear that the new construction rule also may be eaten away. By the magic of the new form of coverage, the requirement of actual participation in the movement in commerce, which is part of the "in commerce" test, and the requirement of close relationship and direct essentiality present in the "production for commerce" test will, for practical purposes, both disappear.

Clearly the result of accepting the interpretation adopted below would be to wipe out at a single stroke the limitations incorporated by Congress in the original Act, and carefully preserved in subsequent amendments. This we do not believe the Court is prepared to do.

CONCLUSION

The Association respectfully urges reversal of the judgment in this case upon the grounds set forth in this brief.

Respectfully submitted,

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No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1952

AISTATE CONSTRUCTION COMPANY, PETITIONER

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

amount of over $178,000 for resurfacing the road previously used as the main highway to New York (R. 23). Some of petitioner's contracts, also comprising a substantial part of the business, call for the furnishing of only materials to be used or applied by the customer or someone other than petitioner (R. 25).[2]

It is stipulated that "Except for certain types of material used for patching purposes in the winter season, practically all of the bituminous concrete material produced at Alstate's three plants is applied to highways, roads, etc. immediately after production" (R. 28). Moreover, the testimony of the employees reveals that the plant sites were the headquarters of the "on-the-road" employees as well as of the employees mixing the amesite (R. 34–35, 39), and, indeed there was considerable interchange between employees performing their duties at the plants and at the road sites (R. 34–40, 43–45). It is stipulated that there was no segregation at any of the three plants of the work of employees employed in pre-

[2] The statement by *amicus curiae* (Br. p. 3) of the "Question Presented" mistakenly assumes that the issue in the instant case is restricted to production of materials "for use by others" in the repair and maintenance work. The issue in *Johnson v. Tobin*, petition for certiorari pending, No. 336, this Term, is so limited. Whether the issue in *Thomas* v. *Hempt Bros.*, No. 410, this Term, is so restricted depends on what may be proved under the complaint there, to which a demurrer was sustained. As the facts are stated in petitioner's brief in that case (Br. pp. 1–2, 3), the issue is not so restricted.

paring the bituminous concrete materials according to the interstate highway or other uses for which those materials were produced (R. 28). Nor was there any such segregation among the truck drivers attached to the Cressona and Naginey plants (R. 11, 28).

Both courts below held that the employees were within the coverage of the Act, rejecting petitioner's contention that a distinction should be drawn between so-called "on-the-road" and "off-the-road" employees. The district court concluded that "the various plants of the defendant were all component parts of an integrated unit, eighty-five and one-half percent of whose total output was directed toward the improvement of various interstate facilities, and that all of the employees of the defendant are definitely within the scope of the statute" (R. 14, 10). The judgment enjoined petitioner from violating the overtime requirements of the Act with respect to "any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act" (R. 18). The Court of Appeals for the Third Circuit affirmed, stating that it could not subscribe to Alstate's contention "that its off-the-road employees, i. e., the mixers and other plant employees who produce the amesite, do not have such immediacy of participation in interstate commerce so as to bring them within its [the Act's] coverage" (R. 68), and that "Alstate's off-the-road employees, in producing

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	8
Argument:	
Employees engaged in the preparation and hauling of materials for use in the repair and maintenance of interstate highways, roads, and railroads are "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act	14
A. Materials produced specifically for use in the repair and maintenance of, and which become part of, interstate instrumentalities are produced "for commerce" within the meaning of the Act	16
1. The decision below gives to the statutory language "for commerce" its normal meaning	16
2. The legislative history prior to enactment of the Act shows that language limited to production "for transportation" was rejected in favor of production "for commerce" without qualification, and that the legislative intent was to give full scope to normal meaning of the language chosen	19
3. The legislative history subsequent to the Administrator's public announcement of the interpretation here in question, including unsuccessful attempts to change this specific interpretation by legislative amendment, shows apparent Congressional approval of the interpretation	24
4. The soundness of the decision below is not affected by the fact that the original administrative interpretation was different	32
5. The corrected administrative interpretation accords with the construction of the statutory language adopted by most courts, and in particular by a consistent line of decisions of the federal courts of appeals	35

Argument—Continued

Page

B. Employees engaged, as an integrated unit, in the repair and maintenance of interstate highways, roads, and railroads are "engaged in commerce," whether their work is "on the road" or "off the road" 44

Conclusion 53

CITATIONS

Cases:

Armour & Co. v. *Wantock*, 323 U. S. 126 18

Atlantic Co. v. *Walling*, 131 F. 2d 518 ..... 11, 36, 42

Barbe v. *Cummins Const. Co.*, 49 F. Supp. 168 40

Bennett v. *Loftis Co.*, 167 F. 2d 286 ..... 43, 48

Boutell v. *Walling*, 327 U. S. 463 ..... 14, 49, 52

Chapman v. *Home Ice Co.*, 136 F. 2d 353, certiorari denied, 320 U. S. 761 ..... 12, 36, 38, 41

Crabb v. *Welden Bros.*, 65 F. Supp. 369 40

Crabb v. *Welden Bros.*, 164 F. 2d 797 43

Dairymen's League Cooperative Ass'n v. *Brannan*, 173 F. 2d 57, certiorari denied, 338 U. S. 825 34

Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349 ..... 22, 24

Fitzgerald (J. F.) Const. Co. v. *Pedersen*, 324 U. S. 720 49

Fleming v. *Atlantic Co.*, 40 F. Supp. 654 ..... 11, 36

Fountain v. *St. Joseph Water Co.*, 352 Mo. 817, 180 S. W. 2d 28 40

Guess v. *Montague*, 110 F. 2d 500 53

Hamlet Ice Co. v. *Fleming*, 127 F. 2d 165, certiorari denied, 317 U. S. 634 39

Hansen v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144 Pac. 896 (1944) 39

Johnson v. *Tobin*, petition for certiorari pending, No. 336, 1952 Term 6

Kennedy v. *Silas Mason Co.*, 334 U. S. 249 44

Kirschbaum Co. v. *Walling*, 316 U. S. 517 ..... 16, 18, 33, 46

Laudadio v. *White Construction Co.*, 163 F. 2d 383 48

Lewis v. *Florida Power and Light Co.*, 154 F. 2d 751 ..... 12, 36, 39

McComb v. *Carter*, 8 WH Cases 489, 16 Labor Cases ¶ 64, 964 39

McComb v. *Johnson*, 174 F. 2d 833 44

McComb v. *Trimmer*, 83 F. Supp. 565 40

McLeod v. *Threlkeld*, 319 U. S. 491 ..... 24, 49, 51

National Labor Relations Board v. *Van Deusen*, 138 F. 2d 893 53

New Mexico Public Service Co. v. *Engel*, 145 F. 2d 636 48

Overnight Motor Co. v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706 ..... 14, 47, 50

Overstreet v. *North Shore Corporation*, 318 U. S. 125 ..... 8, 10, 13, 14, 16, 17, 24, 45, 46, 49

Cases—Continued Page

Pedersen v. *Delaware, L. & W. R. Co.*, 229 U. S. 146 ..... 13, 49
Pedersen v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742, and 324 U. S. 720 ..... 8, 13, 14, 16, 17, 45
Powell v. *U. S. Cartridge Co.*, 339 U. S. 497 17
Ramos v. *P. R. Cement Corp.*, 5 WH Cases 956, 10 Labor Cases ¶ 63,000 40
Ritch v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334 47
Roland Electric Co. v. *Walling*, 326 U. S. 657 40
Schroeder (E. C.) Co. v. *Clifton*, 153 F. 2d 385, certiorari denied, 328 U. S. 858, rehearing denied, 329 U. S. 821 ..... 12, 30, 31, 41, 43
Skidmore v. *Swift & Co.*, 323 U. S. 134 33
Southern United Ice Co. v. *Hendrix*, 153 F. 2d 689 ..... 36, 38, 41
Thomas v. *Hempt Bros.*, No. 410, 1952 Term 6, 15, 40, 43, 44
Tobin v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari, No. 336, 1952 Term 11, 15, 16, 18, 35, 39, 40, 43, 44
United States v. *Darby Lumber Co.*, 312 U. S. 100 23
Virginian Railway Co. v. *System Federation*, 300 U. S. 515 ..... 50, 51
Walling v. *Craig*, 53 F. Supp. 479 40
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564, affirming 128 F. 2d 395 ..... 13, 17, 45, 47, 50, 53
Walling v. *McCrady Const. Co.*, 156 F. 2d 932, certiorari denied, 329 U. S. 780 43
Walling v. *Staffen*, 5 F. R. D. 236 39
Western Union Telegraph Co. v. *Lenroot*, 323 U. S. 490 18
Wiley v. *Stewart Sand & Material Co.*, 240 Mo. App. 392, 206 S. W. 2d 362 40

Statutes:

Fair Labor Standard Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201) as amended by the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. Supp V 201) 30
Preamble 23
Sec. 2 23
Sec. 3 ..... 2, 17, 29, 31
Sec. 7 3
Fair Labor Standards Amendments of 1949, c. 736, Sec. 16, 63 Stat. 910, at 920 ..... 11, 32
Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 30

Congressional material:

Hearings, S. 1349, before Subcommittee of Senate Committee on Education and Labor, 79th Cong., 1st sess., pp. 411–421 ..... 25, 27
Hearings, S. 1349, before Senate Committee on Education and Labor (Part 2), 79th Cong., 2d sess 25

Congressional material—Continued

	Page
Hearings, H. R. 40, H. R. 274, H. R. 284, H. R. 1422, H. R. 2578, H. R. 2980, H. R. 3764, H. R. 3766, H. R. 3886, H. R. 3976, before Subcommittee No. 4 of House Committee on Education and Labor, 80th Cong., 1st sess.:	
Volume 1	26, 28
Volume 2	26, 27
Volume 3	26, 28, 29
Volume 4	26, 28
Hearings, H. R. 2033, before House Committee on Education and Labor, 81st Cong., 1st sess.:	
Volume 1	26, 28
Volume 2	26
Hearings, H. R. 2788, before Subcommittee No. 4 of House Committee on the Judiciary, 79th Cong., 1st sess	25, 27
Hearings, H. R. 584, H. J. Res. 91, before Subcommittee No. 2 of House Committee on the Judiciary, 80th Cong., 1st sess., pp. 503–505	25, 27
Hearings, S. 70, before Subcommittee of Senate Committee on the Judiciary, 80th Cong., 1st sess	25, 27
Hearings, H. R. 3719, H. R. 3837, H. R. 3844, H. R. 3914, H. R. 3928, H. R. 4130, H. R. 4222, before House Committee on Labor, 79th Cong., 1st sess	25, 28
Hearings, S. 49, S. 154, S. 160, S. 161, S. 557, S. 731, S. 1043, S. 1076, S. 1288, S. 1400, S. 1404, S. 1509, S. 2062, S. 2386, before Subcommittee of Senate Committee on Labor and Public Welfare, 80th Cong., 2d sess.	
Part 1 (pp. 237–250)	26, 28
Part 2 (pp. 1229–1231)	26, 27, 29
Hearings, S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, S. 653, before Subcommittee of Senate Committee on Labor and Public Welfare, 81st Cong., 1st sess	26
Hearings S. 336, H. R. 858, before Subcommittee of Senate Committee on Labor and Public Welfare, 81st Cong., 1st sess	26
Statement of the Conferees of the House, 95 Cong. Rec. 14,928, October 18, 1949	30
Statement of a Majority of the Senate Conferees, 95 Cong. Rec. 14,874, October 18, 1949	30
81 Cong. Rec. 7957	19
83 Cong. Rec. 7449–50	19
83 Cong. Rec. 9166–9176	20, 51
83 Cong. Rec. 9168–69, 9176	21, 22
H. Rep. No. 1453, 81st Cong., 1st sess	30
H. Rep. No. 2182, 75 Cong., 3d sess	19
S. 2475, 75th Cong., 1st sess	19

Miscellaneous:

	Page
12 F. R. 7665, 29 C. F. R., 1951 Supp., c. V, Part 776	34
General Statement as to the Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, issued July 1947, 29 C. F. R., 1947 Supp., Part 776 (12 F. R. 4583), Section 776.7	33, 34
Interpretative Bulletin No. 1, "General Statements as to Coverage of the Fair Labor Standards Act of 1938", Sept. 1938 (1940 Wage Hour Manual 129)	34
Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, 29 C. F. R., c. V, Part 776, subpart A, May 1950 (15 F. R. 2925)	33
Interpretative Bulletin No. 5, revised Nov. 1939, "Further Statement as to Coverage of the Fair Labor Standards Act of 1938" (1940 Wage Hour Manual 131)	34
Press Release A-14 issued March 1945, 1945 W. H. Man. 1497	33
Webster's New International Dictionary, 1945 ed., p. 984	18

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 296

ALSTATE CONSTRUCTION COMPANY, PETITIONER

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the district court (R. 7–15) is reported in 95 F. Supp. 585. The opinion of the Court of Appeals (R. 66–70) is reported in 195 F. 2d 577.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1952 (R. 71). A petition for rehearing was denied May 5, 1952 (R. 72). On July 11, 1952, the time for filing a petition for writ of certiorari was extended to August 29, 1952 (R. 74). The petition was filed August 27, 1952,

and certiorari was granted on December 8, 1952 (R. 75). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether employees engaged in the preparation and hauling of materials for use in the repair and maintenance of interstate highways, roads, and railroads are "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201) as amended by the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C., Supp. V, 201) are:

> Sec. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufactur-

ing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * * *

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives a compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Petitioner is engaged in resurfacing existing highways, public roads, and streets used to a substantial extent by interstate traffic (R. 20–21, 27). As the district court found, petitioner's "road work, covered by contracts with the Commonwealth of Pensylvania and many of its political subdivisions, involved no completely original construction, it consisted entirely in some form of resurfacing of previously existing roads, either interstate as such or connecting with an interstate system, with the slight exception involved in the straightening of old road lines * * *" (R. 13). "A typical case would be a through highway carrying a State and frequent-

ly a United States highway number. It may originally have been dirt, but it was none the less a part of an interstate system of highways." (R. 14). Resurfacing frequently also included patching and other preliminary repair on the existing roadbeds (R. 48), eliminating hills (R. 12), and widening curves and shoulders.

The district court found that eighty-five and one-half per cent (85.5%) of petitioner's total output "was directed toward the improvement of various interstate facilities" (R. 14). Petitioner's contracts with the State of Pennsylvania and its political subdivisions totaled $825,025.83, or over 70 per cent of its total business of $1,172,276.70 during the three and one-half years examined (computed from the table in the Stipulation following R. 22). In addition, over 15 per cent of petitioner's business ($177,589.47 in the same period) was with interstate railroads and industrial concerns (*ibid.*). Petitioner's "industrial and railroad work was in each cited instance done for the improvement of the facilities of concerns engaged in interstate commerce" (R. 13). Less than 15% of the business, characterized as "private" work, apparently involved no interstate activity (R. 13).

Petitioner's headquarters are at Harrisburg, Pennsylvania, and it conducts its operations through its plants at Hanover, Cressona, and Naginey (R. 19–20) as "component parts of an integrated unit" (R. 14). Except for the

relatively small amount of private work, each of the three plants participated substantially in each of the types of business listed above in each of the years examined (See table in the stipulation following R. 22).

The materials for the resurfacing operations are produced at all three of petitioner's plants, where the ingredients are combined to produce a bituminous concrete substance known as "amesite" (R. 20). The amesite is then trucked to the road sites where it is applied, frequently while still hot (R. 20–21, 28 par. 7). The employees whose status is here in dispute are those who work in the plants and on the trucks.[1] The close integration which the district court found between the production of this material at the three plant sites and its application to the roads is illustrated in many ways. Much of petitioner's work consists of applying as well as producing the resurfacing materials, pursuant to contracts calling for a completed result involving both labor and materials (R. 20–21). One notable example of this type of work was the contract in the

[1] At the time this suit was filed, petitioner was not paying overtime compensation in accordance with the Act to *any* of its employees (R. 26, par. 13), and petitioner contested coverage with respect to all of its employees, including the employees who actually applied the amesite on the roads, one of its main contentions being that its work was outside the scope of the Act because it was "original construction." See district court opinion (R. 7, 11–14). This contention was abandoned on appeal (R. 66, 68).

material which is used to repair and maintain the surfaces of instrumentalities of commerce, are engaged 'in the production of goods for commerce'" (R. 69).

SUMMARY OF ARGUMENT

On the facts of the instant case, where the work of producing the road materials is directly integrated with the application of those materials to the interstate roads being repaired, the employees preparing the materials are clearly "engaged in commerce or the production of goods for commerce."

A

1. Since it is well established by the decisions of this Court that the maintenance and repair of instrumentalities of interstate commerce is "so intimately related to interstate commerce 'as to be in practice and legal contemplation a part of it'" (*Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 130, and *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742, and 324 U. S. 720, 724–25), the production of materials for use in the repair of, and which become part of, such instrumentalities is production of goods "for commerce" within the normal meaning of those words. Petitioner would read the language as if it said production of goods "for shipment in" or "intended for transportation or sale in" commerce. Not only does the statute not say that, but the

legislative history of this particular phase of coverage shows that language in some of the earlier bills, which would have so stated, was eliminated before the enactment of the Act.

2. The legislative history prior to the original enactment of the Act, as well as the subsequent legislative conduct with respect to amendments to the Act, confirm the intent of Congress to give full scope to the normal meaning of the language "production of goods for commerce." Intermediate bills, including the bill passed by the Senate before conference, provided for coverage in terms of persons engaged "in the production of unfair labor goods *intended to be sold or shipped in commerce*" or *"intended for transportation or sale"* (emphasis supplied) in commerce. This language was rejected in the conference committee in favor of the language now in the Act, which uses the broad phase "for commerce" and omits the qualifying language. Nothing in the legislative debates supports the contention that Congress intended to limit the scope of this phase of coverage in the manner urged by petitioner and *amicus curiae*. On the contrary, as appears from the debate as a whole, there is every reason to believe that Congress intended the coverage to be as broad as the normal meaning of the language it used. Petitioner's argument that, because Congress discarded the phrase "affecting commerce" the Act cannot apply here, ignores the fact that when this lan-

guage was discarded, the "intended for transportation" language was also deleted, and the unqualified phrase "production for commerce" was adopted. Although the language adopted is not coextensive with the constitutional power of Congress over interstate commerce, "Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing" the language which Congress deliberately chose. *Overstreet* v. *North Shore Corp.*, 318 U. S. at 128.

3. Congress has held extensive hearings on various proposed amendments to the Act since the Administrator's public announcement of the interpretation upheld by the court below, and this interpretation was called to the attention of Congress on many occasions both by the Administrator and by representatives of industry trade associations (including *amicus curiae* here), who proposed specific amendments to change that interpretation. All the attempts to change this interpretation by legislative amendments have been unsuccessful, although numerous amendments, some restrictive of coverage, have been enacted. Thus, far from disapproving this administrative interpretation, it appears that Congress, with full knowledge of it, left it in effect by providing in the 1949 Amendments to the Act that "Any order, regulation, or interpretation of the Administrator * * * shall remain in effect * * * except to the extent that [they] * * * may be

inconsistent with the provisions of this [1949] Act * * *." Section 16 (c) of the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 920.

4. In view of this legislative conduct during the years after the Administrator corrected his original interpretation, the fact that the original administrative interpretation was different is of little significance. Plainly his change of view does not affect the validity and soundness of the present interpretation, to which he has consistently adhered for almost eight years with the apparent approval of the Congress.

5. The corrected administrative interpretation accords with the construction of the statutory language adopted by most of the courts, and particularly by a consistent line of decisions in the federal courts of appeals. This construction of the statutory language was adopted as early as June 1941 in the opinion of District (now Circuit) Judge Russell in *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654, 660 (N. D. Ga.), "affirmed throughout" by the Fifth Circuit *sub nom. Atlantic Co.* v. *Walling*, 131 F. 2d 518. Since that date the three other circuits which have considered the question—the Third, Sixth, and Eighth—have adopted the same construction. The Third Circuit below in the instant case and the Eighth Circuit (in *Tobin* v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari, No. 336, this Term) by unanimous decisions have applied

it specifically to "off the road" workers producing materials for the repair and maintenance of interstate roads. The Sixth Circuit applied it with respect to the production of ice for refrigeration of railroad cars. *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C. A. 6), certiorari denied, 320 U. S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C. A. 6). See also the Fifth Circuit's decision in *Lewis* v. *Florida Power and Light Co.*, 154 F. 2d 751, involving the production of electricity for use in operating instrumentalities of commerce. Although there has been some disagreement in the federal district court and in state court decisions, no federal court of appeals has ruled to the contrary. The decision of the court in *E. C. Schroeder* v. *Clifton*, 154 F. 2d 385 (C. A. 10), as distinguished from the opinion of one Judge of that court, is not to the contrary.

B

In view of the close and direct integration of the work of the "off the road" or plant employees and the "on the road" employees in the instant case, the decision below would also appear to rest soundly on the "in commerce" phase of the Act's coverage. The "practical considerations" underlying the decisions of this Court which have held repair and maintenance workers on interstate instrumentalities to be "engaged in commerce" are virtually the same with respect to petitioner's "off the road" and "on the road"

employees. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128, 130; *Pedersen* v. *Fitzgerald Const. Co.*, 318 U. S. 740, and 324 U. S. 720, 724–25. In view of the finding that the functions at petitioner's mixing plans are "all component parts of an integrated unit * * * directed toward the improvement of various interstate facilities," a distinction between "on the road" and "off the road" employees would not seem warranted on any "practical" or realistic basis.

If the work is viewed as "an integrated unit," the employees mixing and hauling the materials to be applied to the roads immediately, frequently while still hot, would seem no less "intimately related to interstate commerce" or 'vital to the proper functioning of these structures as instrumentalities of interstate commerce" (*Overstreet*, 318 U. S. at 128 and 130), than the employees who actually apply the materials to the roads. Certainly the truck drivers who haul the materials to the roads are indistinguishable from the employee carrying a bolt to be used in the repair of a railroad bridge in *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146, which this Court has repeatedly recognized as authoritative on the scope of the "in commerce" coverage of the Fair Labor Standards Act. And the employees engaged in mixing the materials would appear just as intimately related to interstate commerce as the "off the road" clerical workers and the rate clerk held to be engaged "in commerce" in *Walling* v. *Jack-*

sonville Paper Co., 317 U. S. 564, affirming 128 F. 2d 395, 398 (C. A. 5), and *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706; or the "off the road" service and maintenance employees in *Boutell* v. *Walling*, 327 U. S. 463; or the back-shop railroad employees in *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515.

ARGUMENT

EMPLOYEES ENGAGED IN THE PREPARATION AND HAULING OF MATERIALS FOR USE IN THE REPAIR AND MAINTENANCE OF INTERSTATE HIGHWAYS, ROADS, AND RAILROADS ARE "ENGAGED IN COMMERCE OR THE PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

As stated by the courts below (R. 11, 68), petitioner admits that "its employees actually working on the highway or other instrumentality of interstate commerce itself, applying amesite in the repair or maintenance thereof * * * are within the protection of the Fair Labor Standards Act." Petitioner seeks to draw a distinction, however, between the employees, whom it designates as "on-the-road," and the so-called "off-the-road" employees who prepare and haul the materials and road mixes to be used in the repair work. Both courts below, in rejecting such a distinction, relied upon this Court's decisions in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, and *Pedersen* v. *J. F. Fitzgerald Construc-*

tion Co., 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742, and 324 U. S. 720, 724–25, which held that employees engaged in the repair and maintenance of interstate instrumentalities are "engaged in [interstate] commerce" 324 U. S. at 724. The Court of Appeals reasoned that since the maintenance of interstate highways was interstate commerce, the employees who produced the materials used in such maintenance were engaged "in the production of goods *for* commerce" (emphasis supplied) (R. 69).

In the instant case, where the work of producing the materials is directly integrated with the application of those materials to the roads under contracts which provide that petitioner furnish both the materials and the labor for the repair work, we submit that the employees involved are engaged both "in commerce" and in the "production of goods for commerce".[3]

[3] It may be noted that the administrative interpretation asserting coverage generally over the production of road materials for repair of interstate instrumentalities has been predicated only on the "production of goods for commerce" phase of coverage. See *Tobin* v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari No. 336, this Term; see also *Thomas* v. *Hempt Bros.*, No. 410, this Term, in this Court. The brief of *amicus curiae* is directed solely to this general question and its statement of the "Question Presented" (Br., p. 3) ignores the fact that in the instant case petitioner's production of materials is substantially, if not predominantly, for its own use in performing its repair contracts. Although petitioner also produces a substantial amount of materials "for use by others" (R. 25), petitioner, as its name indicates, is essentially a "construction company"

A. MATERIALS PRODUCED SPECIFICALLY FOR USE IN THE REPAIR AND MAINTENANCE OF, AND WHICH BECOME PART OF, INTERSTATE INSTRUMENTALITIES ARE PRODUCED "FOR COMMERCE" WITHIN THE MEANING OF THE ACT.

I. *The decision below gives to the statutory language "for commerce" its normal meaning.*— In the instant case, as in the landmark case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524, "We start with the weighty opinions of the two Circuit Courts of Appeals that the employees here are within the Act" because they are engaged in the "production of goods for commerce." Both the Third Circuit below and the Eighth Circuit (in *Tobin* v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari, No. 336, this Term) have so ruled by unanimous decisions. As we show at pp. 35–44, *infra*, no federal appellate court has held to the contrary.

These decisions are predicated on the literal and normal meaning of the language of the Act. If, as this Court has held (in the *Overstreet* and *Pedersen* cases, *supra*), the maintenance and repair of instrumentalities of interstate commerce constitute an integral part of such commerce, and the highways themselves are in interstate commerce, it follows, literally and logically, that the

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and its employees are engaged in producing the materials work, without segregation, on materials for petitioner's own repair contracts and on materials for others. As noted in the Statement of Facts, it is stipulated that there was no segregation of the work performed by the off-the-road employees at the plants engaged in the production of materials for the various projects (R. 28).

production of materials for use in the repair of, and which actually become part of, such highways is production of goods "*for* commerce" (emphasis supplied). Contrary to petitioner's assertion, this construction is not novel nor does it require any stretching of the legislative language or purpose. It gives to the language of the Act the normal meaning of the words employed.

The breadth of the definition of "commerce" in Section 3 (b) of the Act is now well established. "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567. "And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations," so that employees engaged in "operational and maintenance activities * * * vital to the proper functioning * * * of instrumentalities of interstate commerce" are "engaged in commerce." *Overstreet*, 318 U. S. at 128, 130; *Pedersen*, 318 U. S. 740, and 324 U. S. 724–725. As more recently reemphasized by this Court: "The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality * * *." *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 516. Therefore, "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'". *Overstreet*, 318 U. S. at 128.

As observed by the court of appeals in *Tobin* v. *Johnson* (198 F. 2d at 132), it has also been recognized by this Court "that the phrase 'production for commerce' is 'obviously' more flexible and more inclusive than the phrase 'engaged in commerce.'" See *Armour & Co.* v. *Wantock*, 323 U. S. 126, 131. Although the word "for" is not specially defined in the Act, it is a word "of ordinary speech" to be given all the meaning it has "in ordinary intercourse in this context." *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, at 503. The popular understanding and dictionary definition of the word "for" includes "as a preparation towards * * * to serve as, or as part of; to supply the need of; in order to effect." *Webster's New International Dictionary*, 1945 Ed. p. 984. As the road material here is stipulated to have been produced directly and specifically and immediately "for use in the construction, extension, repair, resurfacing, reconstruction, and maintenance of existing [interstate] highways" (R. 28) which indisputably are in interstate commerce, its production would seem to be clearly "for commerce" within the "normal and spontaneous meaning of the language." See *Kirschbaum Co.* v. *Walling*, 316 U. S. at 524.

Petitioner would read the language as if it said production of goods "for shipment in" or "intended for transportation or sale in" commerce. But the statute does not say that. Indeed, the legislative history of this particular

phase of coverage shows that original language which would have so stated was eliminated.

2. *The legislative history prior to enactment of the Act shows that language limited to production "for transportation" was rejected in favor of production "for commerce" without qualification, and that the legislative intent was to give full scope to the language chosen.*—In their intermediate stages, virtually all of the Senate bills and the bill originally reported to the House provided for coverage in terms of "any employee engaged in interstate commerce or in the production of goods *"intended for transportation or sale"* in commerce. [See, e. g., S. 2475, 75th Cong., 1st Sess., as introduced in the Senate on May 24, 1937, Section 7 (c); as passed by the Senate on July 31, 1937, Section 7 (2); as referred to the House Labor Committee on August 2, 1937, and as referred to the House on August 6, 1937, Section 7 (2)]. The bill which was passed by the Senate (81 Cong. Rec. 7957) contained this provision, while the bill passed by the House applied to employers "engaged in commerce in any industry affecting commerce" (Sections 4 and 5, H. Report No. 2182, 75th Congress, 3rd Session, page 2; 83 Cong. Rec. 7449–50). But the Senate Bill, like the House Bill, was rejected in the conference committee in favor of the language now in the Act, which uses the broad phrase "for commerce" and omits the qualifying language of the Senate-passed bill requiring

that the production be intended "for transportation or sale" or shipment in commerce.

Thus, Congress omitted language which would have limited the "production" phase of coverage to production of goods for shipment, transportation, or sale. Nor is there anything in the legislative debates to support the contention that Congress intended to limit the scope of this phase of coverage in the manner urged by petitioner and *amicus curiae*. The excerpts from the colloquy between Senators Bailey and Borah, quoted in the brief of *amicus curiae* (pp. 11–12), when read in their context, reveal an intent quite opposite from that suggested in the brief of *amicus curiae*. The colloquy was concerned only with the question whether the bill was within the *constitutional* power of Congress under the commerce clause. Naturally the Senators began with a discussion of the most significant application—to the factory shipping its product interstate. But nothing in the quotation or its context indicates an intent to limit the coverage of the Act to that example. On the contrary, both Senators Bailey and Borah (and other Senators who joined the discussion) obviously felt that the coverage of the bill extended to other situations that might not involve shipment of goods in commerce, as appears from the debate as a whole (83 Cong. Rec. 9166–9176, 75th Cong. 3rd Sess.) and from the following portions in particular.

In the portions of the colloquy immediately following the excerpts quoted in the brief of *amicus curiae,* Senator Borah spoke in considerably broader terms than the *shipment* of goods in interstate commerce. Thus he took the position that a back-shop employee "in a machine shop of a railroad company, who himself individually was never in the channels of trade, who lived and did his work solely within the State as a workman in a machine shop" should be subject to Federal wage and labor regulation "as part of the railroad system" (83 Cong. Rec., pp. 9168–69, 75th Cong., 3d Sess.). When Senator Bailey agreed to the soundness of this suggestion,[4] but sought to distinguish the production of what he termed "industry" as in a cotton mill, Senator Borah rejected such a distinction, stating:

> * * * Take the case of any industry; I do not care what the industry is: if, *as a system,* it is engaged in interstate commerce *and the workman is a necessary part of carrying on the system,* my contention is

[4] Senator Bailey even added that "the instrumentality idea as applied to railroads takes in the whole system" including "every man wherever he may be and whatever he is doing, providing he is doing something with regard to that system" (*id.* at 9169), and that he "would have no difficulty in saying that the regulatory power of the Congress would attach" to "a worker in a machine shop on a railroad who never left the State in his life but who was repairing engines engaged in interstate commerce, or *cars so related to interstate commerce, even if they never left the State themselves*" (*id.* at 9170, emphasis supplied).

> that the Congress of the United States may regulate his minimum wage * * *.
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> * * * * * *
>
> I said a few minutes ago that in order that the worker shall be subject to regulation in his minimum wage under this bill, it must be shown that he is so far engaged in interstate commerce *as to be a producer of a part of the working machinery of that system* [*Id.* at 9169, emphasis supplied].

Thus, although it may be true that when the Act was passed the legislators spoke more frequently in relation to the most significant situation to which the Act was addressed—production of goods to be transported across state lines—it is clear that the language employed was not intended to be limited to that situation. The statutory language was chosen with great deliberation. A limitation to the concept which petitioner would now attribute to Congress was not accepted, and there is every reason to believe that Congress intended the coverage to be as broad as the normal meaning of the language it used.

Although, as this Court has held, Congress adopted language which is not coextensive with its constitutional power, in that it discarded the "affecting commerce" phrase and language encompassing local production which merely competed with interstate produers (as in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349), nevertheless Congress substituted a phrase of very broad scope, and did so on the basis that produc-

tion of goods for commerce *affects* commerce.[5] Petitioner's argument that, because Congress discarded the phrase "affecting commerce" in the operative provisions of the Act, the Act cannot apply here, overlooks the fact that when this phrase was deleted the broad phrase "production of goods for commerce" was selected in preference to the qualified language of the Senate bill. Petitioner also overlooks the fact that inclusion of "production" within the coverage of the Act was expressly predicated on the finding that such production affects commerce. It was precisely because the production "is so related to the commerce and so *affects* it" (emphasis supplied) that this Court sustained the constitutional validity of the application of this Act to the production of goods for commerce. *United States* v. *Darby Lumber Co.*, 312 U. S. 100, 119–123. Obviously the Act applies to many activities which "affect commerce" even though it does not use that phrase. Stripped of its verbiage, petitioner's argument is that because Congress has not included *all* activities

[5] Thus the preamble describes the Act as one "to provide for the establishment of fair labor standards in employment in *and affecting* interstate commerce, and for other purposes" (emphasis supplied); and Section 2 (a) "Finding and Declaration of Policy" states, *inter alia*, that the existence of substandard labor conditions "in industries engaged in commerce or in the production of goods for commerce * * * (2) burdens commerce and the free flow of goods in commerce; * * * (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

affecting commerce, it must have excluded some production of goods for commerce which affects commerce. This Court has rejected the argument even when it appeared in more plausible context. In *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128, the Court cautioned that "Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.'" *A fortiori*, there is no reason for restricting the broader and more flexible phrase "production of goods for commerce" more narrowly than the normal meaning of the language requires.[6]

3. *The legislative history subsequent to the Administrator's public announcement of the interpretation here in question, including unsuccessful attempts to change this specific interpretation by legislative amendment, shows apparent Congressional approval of the interpretation.*—Since the enactment of the Act there have been several hun-

[6] The assertion by *amicus curiae* (Br. pp. 14–15) that the Government's construction wipes out the limitations Congress intended to place on the scope of the Act when it deleted "affecting commerce" language plainly exaggerates the effect of the Government's position. There still remains outside the scope of the Act a substantial area of activities within the constitutional power of Congress to regulate, such as production of the type involved in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, the handling and distribution of goods after arrival from an out-of-State source (see *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564), and the preparation of goods to supply personal needs of employees engaged in interstate commerce (as in *McLeod* v. *Threlkeld*, 319 U. S. 491).

dred bills introduced in both Houses of Congress proposing amendments to the Act, including several proposals for comprehensive revisions of its coverage. Extensive hearings have been held on various of these bills in the 79th, 80th, and 81st Congresses,[7] all during the period (1945–

[7] *79th Congress, 1st Session:*

Hearings, S. 1349, before Subcommittee of Senate Committee on Education and Labor, September 25–28; October 2, 4, 5, 9, 10, 12, 18–19, 23, 25–26, 1945 (Part 1) [to raise minimum wages and to make other amendments].

Hearings, H. R. 2788, before Subcommittee No. 4 of House Committee on the Judiciary, June 11, 13, 27; July 2, 1945 (Serial No. 9) [to enact a statute of limitations].

Hearings, H. R. 3719, H. R. 3837, H. R. 3844, H. R. 3914, H. R. 3928, H. R. 4130, H. R. 4222, before House Committee on Labor, October 15–19, 22–26, 30–31; November 1–2, 5–9, 13–15, 1945 [to raise minimum wage and to make other amendments].

2d Session: Hearings, S. 1349, before Senate Committee on Education and Labor, January 18–19, 21, 1946 (Part 2) [to raise minimum wage and to make other amendments].

80th Congress, 1st Session:

Hearings, S. 70, before Subcommittee of Senate Committee on Judiciary, January 15–18, 20–23, 25, 27, 30, 1947 [to exempt employers from liability for portal-to-portal type activity].

Hearings, H. R. 584, H. J. Res. 91, before Subcommittee No. 2 of House Committee on Judiciary, February 3–7, 10, 1947 [to prohibit recovery for portal-to-portal type activity, and to enact statute of limitations].

Hearings, H. R. 40, H. R. 274, H. R. 284, H. R. 1422, H. R. 2578, H. R. 2980, H. R. 3764, H. R. 3766, H. R. 3886, H. R. 3976, before Subcommittee No. 1 of House Committee on Education and Labor, June 27, 30; July

1949) after the Administrator had publicly interpreted the Act as applicable to persons such as petitioner. Many amendments have been enacted. The significant fact emerging from this legislative history in so far as the instant case is concerned is that although the statute was changed in other respects, no amendment was adopted with respect to the situation here involved, despite the fact

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1–2, 7–11, 14, 1947. (Volume 1) [to raise minimum wage, and to make other amendments]; October 20–22, 24, 27–31, 1947 (Volume 2) [scope of hearings broadened to include other sections of the Act, and to determine specific types of amendments to be considered after Congress met in January 1948]; November 5–8, 10–15, 1947 (Volume 3) [*id.*]; November 17–21, 24–25; December 17, 1947 (Volume 4) [*id.*].

2d Session: Hearings, S. 49, S. 154, S. 160, S. 161, S. 557, S. 731, S. 1048, S. 1076, S. 1288, S. 1400, S. 1404, S. 1509, S. 2062, S. 2386, before Subcommittee of Senate Committee on Labor and Public Welfare, April 19–23, 26, 1948 (Part 1); April 27–30; May 3–4, 1948 (Part 2) [comprehensive amendment of the Act].

81st Congress, 1st Session:

Hearings, S. 336, H. R. 858, before Subcommittee of Senate Committee on Labor and Public Welfare, March 2–3, 5, 7–10, 14, 1949 [to clarify overtime compensation requirements of the Act].

Hearings, S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, S. 653, before Subcommittee of Senate Committee on Labor and Public Welfare, April 11–14, 18–22, 1949 [to broaden coverage, to raise minimum wage, and to make other amendments].

Hearings, H. R. 2033, before House Committee on Education and Labor, January 27–28, 31; February 1–5, 1949 (Volume 1); February 7–9, 14–18, 1949 (Volume 2) [to broaden coverage, to raise minimum wage, and other comprehensive amendments].

that the pertinent official interpretation was specifically drawn to the attention of Congress by representatives of the Association of Ice Industries and of the Sand and Gravel Association (*amicus curiae*), and by the Administrator of the Wage and Hour Division, on many occasions.[8]

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[8] *National Sand and Gravel Association and National Ready-Mix Concrete Association, through the Executive Secretary for both Associations, Vincent P. Ahearn:*

Hearings, H. R. 2788 before Subcommittee No. 4 of House Committee on Judiciary, 79th Cong., 1st Session, pp. 35–37.

Hearings, S. 79, before Subcommittee of Senate Committee on Judiciary, 80th Cong., 1st Sess., pp. 810–811.

Hearings, H. R. 584, H. J. Res. 91 before Subcommittee No. 2 of House Committee on Judiciary, 80th Cong., 1st Session, pp. 503–505.

Hearings, H. R. 40, etc., Proposed Amendments of the Fair Labor Standards Act, before Subcommittee No. 4 of House Committee on Education and Labor, 80th Cong., 1st Session, pp. 1373–1379 (Volume 2) [Accompanied by Charles A. Horsky, Esquire, Counsel for the National Sand and Gravel Association, Washington, D. C.]

Hearings, S. 49, S. 154, S. 160, S. 161, S. 557, S. 731, S. 1048, S. 1076, S. 1288, S. 1400, S. 1404; S. 1509, S. 2062, before Subcommittee of Senate Committee on Labor and Public Welfare, 80th Cong., 2d Session, pp. 1229–1231 (Part 2).

National Association of Ice Industries, through its General Counsel, William T. Jobe:

Hearings, S. 1349, before Subcommittee of Senate Committee on Education and Labor, 79th Cong., 1st Session, pp. 411–421.

Hearings, H. R. 3914, H. R. 3928, H. R. 4222, H. R. 4130, H. R. 3844, H. R. 3837, H. R. 3719, before House Committee on Labor, 79th Cong., 1st Session, pp. 431–440.

The Administrator made a full explanation of the interpretation and the circumstances under which it was adopted and first announced in Press Release A-14.[9] The General Counsel of the National Association of Ice Industries, and the Secretary of the National Sand and Gravel Association (*amicus curiae*), and National Ready-Mix Concrete Association appeared before both Senate and House Committees during Hearings in the 79th, 80th, and 81st Congresses to protest the administrative interpretation and in some instances to propose specific amendments to change

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Hearings, H. R. 584, H. J. Res. 91 before Subcommittee No. 2 of House Committee on Judiciary, 80th Cong., 1st Session, pp. 412–418.

Hearings, H. R. 40, H. R. 274, H. R. 284, H. R. 1422, H. R. 2578, H. R. 2980, H. R. 3764, H. R. 3766, H. R. 3886, H. R. 3976, before Subcommittee No. 4 of House Committee on Education and Labor, 80th Cong., 1st Session, pp. 447–461 (Volume 1); 1425–1441 (Volume 3).

Hearings, S. 49, S. 154, S. 160, S. 161, S. 557, S. 731, S. 1048, S. 1076, S. 1228, S. 1400, S. 1404, S. 1509, S. 2062, S. 2386, before Subcommittee of Senate Committee on Labor and Public Welfare, 80th Cong., 2d Session, pp. 237–250 (Part 1).

Hearings, H. R. 2033, before House Committee on Education and Labor, 81st Cong., 1st Session, pp. 454–468 (Volume 1).

[9] Hearings, H. R. 40, etc., Proposed Amendments of the Fair Labor Standards Act, before Subcommittee No. 4 of House Committee on Education and Labor, 80th Cong., 1st Session, testimony of the former Administrator Walling, p. 2321, *et seq.* (Volume 4) and that of Administrator McComb and Chief of Interpretations Nystrom, p. 2533 *et seq.* (Volume 4).

that interpretation. For example, the Executive Secretary for the Association which has filed the brief *amicus curiae* here appeared before the House Committee of the 80th Congress holding hearings on several bills proposing broad amendments to the Act, and recommended an addition to Section 3 (i)—the definition of "goods"—which would expressly exclude "materials such as, but not limited to, sand, gravel, asphalt, concrete, macadam, or railroad ties which are used within the State of production in the construction, maintenance, repair, or reconstruction of instrumentalities or facilities of commerce" (Hearings, H. R. 40, etc., before Subcommittee No. 4 of House Education and Labor Committee, 80th Cong., 1st Sess., pp. 1374–1375). As an alternative he proposed a similar amendment to the definition of "production" in Section 3 (j), or an amendment to the definition of "commerce" in Section 3 (b) "by stating that 'commerce' does not mean the instrumentalities or facilities of commerce" (*id.* at p. 1375). Similar proposals were made before a Subcommittee of the Senate Labor and Public Welfare Committee, 80th Congress, 2d Sess. during hearings on numerous bills proposing comprehensive amendments to the Act. (Hearings, S. 49 and 13 other bills, Part 2, p. 1229, at 1230). No such amendment was either then or later adopted by Congress, although numerous other amendments to the Act, some of them restrictive of coverage, have been enacted. See particularly

Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910; and Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84.

Petitioner and the brief of *amicus curiae* purport to find an intent to overturn the administrative interpretation in the 1949 Amendments. However, no mention whatsoever appears in the House or Senate Reports and debates on these amendments indicating any intent to change this interpretation or the court decisions on which it was predicated. The significance of this silence is evident from the fact that express consideration was given and statements made with respect to many other court decisions and administrative interpretations on the coverage of the Act. See House Managers Report, H. Report No. 1453, 81st Congress, 1st Sess.; Statement of a Majority of the Senate Conferees, 95 Cong. Rec. 14,874, October 18, 1949; Statement of the Conferees of the House, 95 Cong. Rec. 14,928, October 18, 1949. As has been pointed out, no specific amendment deals with the instant problem, although numerous efforts to amend the Act in that respect had been made.

The reference to *Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (C. A. 10), certiorari denied, 328 U. S. 858, in House Report No. 1453, on which petitioner and *amicus curiae* rely (Pet. Br. p. 21; *amicus curiae* Br. p. 24), has no bearing on the issue here presented. It refers only to that part of the *Schroeder* decision relating to the quarrying of rock for construction of a dike to protect

from flooding an oil field producing oil for commerce.[10] As conceded in the brief of *amicus curiae*, the report "does not refer directly to employees involved in the other branch of the *Schroeder* case" (Br. p. 25). Not only is there no such direct reference but no reference whatsoever was made in this report, or in anything else in the legislative history, to this "other branch" of the *Schroeder* case—the issue of coverage of production of materials for use in the repair of interstate roads and instrumentalities.

In view of the extensive, explicit consideration previously given to the administrative interpretation here in question, and the unsuccessful attempts to amend the law with respect to it, petitioner's contention that disapproval of the other aspect of the *Schroeder* case implies approval of this aspect (Br. p. 25; see also *amicus curiae* Br. pp. 21–22) is plainly untenable. At the time of the enactment of the 1949 Amend-

[10] Coverage of this work depended upon the portion of Section 3 (j) of the Act covering "any process or occupation necessary to the production" of goods which were shipped in commerce. This phrase of Section 3 (j) of the Act was amended by the 1949 Amendments so as to read "any closely related process or occupation directly essential to the production." Coverage in the instant case rests, not upon the ground that the work in question is an occupation "necessary to" or "closely related" and "directly essential to" production of other goods for interstate commerce, but on the ground that the preparation of materials specifically for use in repair and maintenance of instrumentalities of commerce is a part of such commerce or is production directly "for commerce," without reference to the amended phrase.

ments it was well known that the Administrator was still asserting coverage of the production of materials for repair and maintenance of interstate instrumentalities and that two cases instituted by the Administrator (the instant case and *Tobin* v. *Johnson, supra,* p. 11) were then pending in the courts. Thus, far from disapproving this administrative interpretation, Congress, with full knowledge of it, left it in effect, indeed expressly so by Section 16 (c) of the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910 at 920, which provides:

> Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

4. *The soundness of the decision below is not affected by the fact that the original adminis-*

trative interpretation was different.—It is true that the Administrator, prior to 1945, interpreted the Act as inapplicable to the situation here involved. But he corrected his interpretation almost eight years ago.[11] As this Court and the Administrator himself have repeatedly cautioned, "the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute" (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523), and the Administrator's interpretations, while entitled to great weight, "are not, of course, conclusive, even in the cases with which they directly deal." (*Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139). Thus the Administrator has consistently cautioned in the announcement of his interpretations that they "serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties

[11] The Administrator's position was stated in a press release (Release A–14), issued March 1945, 1945 W. H. Man. 1497, and repeated in his General Statement as to the Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, issued July 1947, 29 CFR, 1947 Supp., Part 776 (12 F. R. 4583), Section 776.7 paragraph (c); incorporated in Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, 29 C. F. R., c. V, Part 776, subpart A, May 1950 (15 F. R. 2925). The portion pertinent here (Section 776.21 (a) and (b)), appears in the record of this case (R. 52–56). As stated explicitly in the Release itself, this represented a change in the Administrator's previous interpretation (1945 W. H. Man. 1497–98).

unless he is directed otherwise by authoritative rulings of the courts or unless he shall subsequently decide that his prior interpretation is incorrect." [12]

In this connection, see the very pertinent statement by Chief Judge Learned Hand in upholding a similarly changed administrative interpretation under the Agricultural Adjustment Act in the case of *Dairymen's League Cooperative Ass'n* v. *Brannan*, 173 F. 2d 57 (C. A. 2), certiorari denied, 338 U. S. 825. There, Judge Hand observed that the original administrative interpretation was issued "at a time when, in the nature of things, interpretation was tentative, or, if it was not, ought to have been. We are indeed aware how great an advantage familiarity with the multifarious ramifications of such a subject as milk regulation gives to administrators, and how much less favored are we who must plunge into it unequipped. Nevertheless, we should have to endow them with almost supernatural powers, if they were not, like ourselves, at the outset stunned and confounded by the fantastic proliferation which emerges, when one attempts to find a path through such verbal mazes. We are satisfied that the second thought of the Ad-

[12] See, for example, Interpretative Bulletin No. 5, reissued as revised November 27, 1939, "Further Statement as to Coverage of the Fair Labor Standards Act of 1938" (1940 Wage Hour Manual 131). See also Interpretative Bulletin No. 1, "General Statements as to Coverage of the Fair Labor Standards Act of 1938," first issued September 22, 1938 (1940 Wage Hour Manual 129). For more recent reiterations of this caution, see 12 F. R. 4583, 29 CFR, c. V, Part 776; 12 F. R. 7665, 29 CFR, 1951 Supp., c. V, Part 776.

ministrator was better than his first; and we do not feel bound to accept the early ruling." 173 F. 2d at 65–66.

During the almost eight years that the Administrator's changed interpretation has been in effect, Congress, as noted above, pp. 27–30, has had numerous occasions to consider it and the several attempts to overcome it by legislation (including attempts by *amicus curiae* here) have proved unsuccessful. Moreover, as more fully shown, *infra*, the corrected interpretation has been the view consistently adopted by the federal courts of appeals. This impressive legislative and judicial support for the decision below more than offsets, we submit, any doubt the original administrative view may have cast upon its soundness.

5. *The corrected administrative interpretation accords with the construction of the statutory language adopted by most courts, and in particular by a consistent line of decisions of the federal courts of appeals.*—At least four Circuits—the Third, Fifth, Sixth and Eighth—have adopted the construction of the statute here advanced by the Government. Both circuits which have ruled on the specific issue of coverage of so-called "off the road" workers producing materials for the repair and maintenance of interstate instrumentalities (the court below here and the Eighth Circuit) have reached the same result by unanimous decisions. See *Tobin* v. *Johnson*, petition for certiorari pending, No. 336, this Term. And the two

other circuits have expressly adopted the same rationale with respect to the production of ice and electricity for use in operating instrumentalities of commerce. *Atlantic Co.* v. *Walling,* 131 F. 2d 518 (C. A. 5); *Lewis* v. *Florida Power & Light Co.,* 154 F. 2d 751 (C. A. 5); *Chapman* v. *Home Ice Co.,* 136 F. 2d 353 (C. A. 6), certiorari denied, 320 U. S. 761; *Southern United Ice Co.* v. *Hendrix,* 153 F. 2d 689 (C. A. 6).

The reasoning underlying this construction was clearly and simply expressed as early as June 1941 in the opinion of District (now Circuit) Judge Russell in *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654, at 660 (N. D. Ga.), "affirmed throughout" by the Fifth Circuit, *sub nom. Atlantic Co.* v. *Walling,* 131 F. 2d 518. In an opinion, characterized by the Court of Appeals as "thoughtful and carefully worked out" (131 F. 2d, at 520), Judge Russell held that the manufacture and delivery of ice to railroads for refrigeration of railroad cars used to transport perishable goods was "production of goods for commerce." His reasoning was as follows (40 F. Supp. at 660–661):

> "For," though not defined, is doubtless employed in its most general sense, indicating that in consideration of which, in view of which, or with reference to which, anything is done or takes place, *or as indicating the end to which anything acts, serves* or is done, "as a preparation towards or in view of; having as goal or object; * * * *to serve as part of; to sup-*

ply the need of; in order to effect." Webster's New International Dictionary.

After lengthy and serious consideration, the meaning and extent of the word "for" looms large in determining in one's mind the application of the Act intended by Congress. In other words, whether "for commerce" is restricted only to articles produced to be sold, shipped and transported "in commerce," or whether the words mean "produced" for the purpose of carrying on commerce, "or produced in consideration of, to serve as part of, or to supply the need of, or in order to effect commerce."

* * * * *

The "commerce" of the Act as relates to the production of goods is equally as broad as the commerce with reference to those engaged in commerce. In neither instance is the term restricted to the production, shipment, sale, transportation, or receipt of goods as articles of commerce, that is, those which are produced or sold for trade. Thus those who *maintain the means of transportation,* though having no direct connection with the manufacture, shipment, purchase or sale of the goods transported, are engaged in commerce because patently their work is essential to the carrying on of commerce. * * *

* * * * *

So commerce as generally understood, and transportation as generally understood,

> and *those acts, services and supplies which are a component part of the carrying on of such commerce, are fairly within the definition of commerce* as contained in the Act. As thus construed, the phrase engaged in "the production of goods for commerce" includes "the production of goods in view of, *or to serve as an essential part* of interstate transportation or commerce." [Italics supplied.]

The *Atlantic Co.* decision was followed by the Sixth Circuit in *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, at 355, certiorari denied, 320 U. S. 761, where it was again emphasized that the statutory objectives as well as the literal language of the Act required such construction:

> In the light of these decisions and the admonition in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, * * *, decided February 1, 1943, that the Fair Labor Standards Act aims at protecting commerce from injury through adjustment of the master-servant relationship by eliminating substandard working conditions, we are constrained to hold that the employees of the appellee who were engaged in the production, transportation or delivery of ice intended for servicing interstate facilities were engaged in the production of goods for commerce. * * *

To the same effect see *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C. A. 6); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144

P. 2d 896 (1944); *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C. A. 5), involving the production of electricity for local distribution some of which was used in operating railroad signal devices and airport beacons. See also *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C. A. 4), certiorari denied, 317 U. S. 634, which reached the same result as in the other ice company cases although not apparently on the basis of the rationale of the *Atlantic Co.* opinion.

These principles were most recently applied in the decision of the Eighth Circuit in *Tobin* v. *Johnson*, 198 F. 2d 130, petition for certiorari pending, No. 336, this Term, which followed the decision below in the instant case to hold that "off-the-road" quarry workers producing material for use in the repair and maintenance of interstate instrumentalities were engaged in the production of goods for commerce. Accord: *McComb* v. *Carter*, (not officially reported) 8 WH Cases 489, 16 Labor Cases ¶64,964 (E. D. Va. 1948), involving truck drivers and a mechanic hauling and otherwise handling sand and gravel for use in repair of the Virginia State Highway system; see also *Walling* v. *Staffen*, 5 F. R. D. 236 (W. D. N. Y. 1946).

In the light of these authorities supporting the view here advanced by the Government, particularly the consistent line of decisions in the federal appellate courts, petitioner's assertion that "judicial expression has been overwhelm-

ingly in support of petitioner's position" (Br. p. 28), is plainly untrue.[13]

[13] Admittedly, as the court below noted, there has been some conflict in the federal district court decisions (R. 68, fn. 6), as well as in the state court decisions. Those which appear to be contrary to the administrative construction are cited in petitioner's brief, pp. 28–30. Most, if not all of these decisions are of dubious weight. *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn., 1943), for example, involved no contest on this issue since it was decided before the adoption of the administrative interpretation here advanced, and moreover is contrary to the decision of the court of appeals in that circuit (*Tobin* v. *Johnson*, 198 F. 2d 130 (C. A. 8), pending on petition for certiorari, No. 336, this Term); similarly *McComb* v. *Trimmer*, 85 F. Supp. 565 (D. N. J., 1949), is contrary to the decision of its court of appeals, the Third Circuit, in the case at bar; *Crabb* v. *Welden Bros.*, 65 F. Supp. 369 (S. D. Iowa, 1946), as noted in the text, p. 43, *infra*, was predicated on the fact that original construction only was involved, as the Eighth Circuit's decision in that case and in *Tobin* v. *Johnson* demonstrate; *Wiley* v. *Stewart Sand & Material Co.*, 240 Mo. App. 392, 206 S. W. 2d 362 (1947) was decided on the authority of the Missouri Supreme Court's decision in *Fountain* v. *St. Joseph Water Co.*, 352 Mo. 817, 180 S. W. 2d 28 (1944), which is in direct conflict with this Court's decision in *Roland Electric Co.* v. *Walling*, 326 U. S. 657, 663, holding that the Act "does *not* require the employee to be employed even in the production of an article which *itself* becomes the subject of commerce or transportation among the several states." *Barbe* v. *Cummins Const. Co.*, 49 F. Supp. 168 (D. Md., 1943), is simply not in point because it involves only the original construction of a building; *Ramos* v. *P. R. Cement Corp.* (not officially reported), 5 WH Cases 956, 10 Labor Cases ¶63,000 (D. P. R., 1946), was decided on a motion to dismiss without a trial of facts. This same defect is present in *Thomas* v. *Hempt Bros.*, No. 440, this Term, in which certiorari was granted simultaneously with the grant of certiorari in the instant case. See discussion of this case in the text, *infra*, pp. 43–44.

The reasoning of the so-called ice company cases persuaded the Administrator, after careful consideration of the views and arguments of industry representatives, that his earlier interpretation should be changed to accord with the court decisions. If the production of ice is production of goods for commerce because it is produced "to serve as a part of, or to supply the need of" interstate commerce, or for the purpose of "servicing interstate facilities," then so is production of material which is produced for the very purpose of becoming a part of and maintaining interstate highways in condition to perform their function of transporting commodities and persons interstate. Petitioner and *amicus curiae* seek to distinguish these decisions from the instant case on the ground that some of the ice itself moved across state lines. The supposed distinction, at best, is factually speculative, since it does not appear in some of these cases whether the ice actually moved across State lines. See e. g., *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C. A. 6), certiorari denied, 320 U. S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C. A. 6). In any event it is clear that most of these decisions were not grounded on this factor but rather were based on the rationale quoted in the text, *supra*, pp. 36–38, from the *Atlantic Co.* opinion.

The decision of the court in *Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (C. A. 10), certiorari

denied, 328 U. S. 858, rehearing denied, 329 U. S. 821, on which petitioner relies heavily (Br. pp. 13, 29), does not conflict with the rationale of the above decisions. That case involved the application of the Act to employees of a quarry whose product was used for the construction of some railroad trackage and highways which were new segments to be connected to an existing interstate highway and railway to replace portions of those roads expected to be inundated. The district court held that the employees were engaged in the production of goods for commerce and that it was unnecessary to decide whether this was original construction or reconstruction. 5 W. H. Cases 286, 9 Labor Cases ¶62,679. In the decision of the Court of Appeals for the Tenth Circuit reversing the district court, each of the three participating judges expressed a different view. Judge Huxman, dissenting, stated his view that the judgment of the trial court on this point "should be affirmed" (153 F. 2d at 394). Of the two judges forming the majority, Judge Bratton alone rejected the reasoning of *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C. A. 5) without distinguishing between original construction and repair. The deciding vote was cast by Judge Phillips who, in his separate opinion, appeared to accept, or at least explicitly refrained from controverting, the rationale of the *Atlantic Co.* case and the other similar decisions. He stated that in his view the doctrine of those decisions had no bearing

on the facts of the *Schroeder* case because of his assumption that the *Schroeder* case involved "new construction," which was outside the scope of the Act for other reasons. 153 F. 2d at 391, 393.[14] That Judge Phillips' opinion is certainly not inconsistent with the position here advanced by the Government is evident by comparison of the Eighth Circuit decision upholding coverage in *Tobin* v. *Johnson*, 198 F. 2d 130, which did not involve original construction, with that same court's decision in *Crabb* v. *Welden Bros.*, 164 F. 2d 797 (C. A. 8) which, on the ground that original construction was involved, reached the same result as had Judge Phillips in *Schroeder Co.* v. *Clifton*.

This analysis of the *Schroeder* case, we think, demonstrates the error of the Supreme Court of Pennsylvania in *Thomas* v. *Hempt Bros.* No. 410, this Term, in which certiorari was granted simultaneously with the grant of certiorari in the instant case. The Pennsylvania Supreme Court's main reason for refusing to follow the decision of the federal Court of Appeals in its Circuit was predicated upon the erroneous assumption that the decision *of the court* in *Schroeder Co.* v. *Clifton* was in conflict with the Third Circuit's decision. Moreover, in addition to misconstruing

[14] Compare the later decisions holding that construction of new segments of existing roads and railroads is not original construction but is covered by the Act as repair and maintenance work. *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (C. A. 3), certiorari denied, 329 U. S. 780; *Bennett* v. *Loftis Co.*, 167 F. 2d 286 (C. A. 4).

the opinion of one Judge as the decision of the court, the Pennsylvania Supreme Court misconstrued the decision below as depending upon the "process or occupation necessary to the production" language of the Act. Finally, the Pennsylvania Supreme Court erred in undertaking to resolve this important question of coverage without a trial or other adequate factual development, contrary to this Court's decision in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 257.[15]

B. EMPLOYEES ENGAGED, AS AN INTEGRATED UNIT, IN THE REPAIR AND MAINTENANCE OF INTERSTATE HIGHWAYS, ROADS, AND RAILROADS ARE "ENGAGED IN COMMERCE," WHETHER THEIR WORK IS "ON THE ROAD" OR "OFF THE ROAD"

As already noted, petitioner concedes (R. 88), as indeed it must, that employees directly apply-

[15] Contrast the more careful approach of the Eighth Circuit in *McComb* v. *Johnson*, 174 F. 2d 833, where that Court in reliance on *Kennedy* v. *Silas Mason*, *supra*, refused to decide this issue on the pleadings and remanded the case for a full trial. While we believe that the issue presented in all three cases is substantially the same, there is the factual difference that in the instant case the petitioner not only produces the road materials but himself actually performs the repair work. If this Court concludes that this factual difference makes the issue substantially different, we submit that the issue presented by the complaint in *Thomas* v. *Hempt Bros.* should not be determined on the basis of the incomplete factual record in that case, but that certiorari should be granted in *Tobin* v. *Johnson*, 198 F. 2d 130, pending on petition for certiorari, No. 336, this Term, which presents the issue on a full record of the facts in a suit to which the Government is a party. Indeed, it is not clear from the complaint that Hempt Brothers did not also apply the material on the roads. Petitioner states that they do (Br. pp. 1–2, 3).

ing the materials to interstate highways, roads, and railroads are engaged "in commerce" because they are engaged in the repair and maintenance of instrumentalities of interstate commerce. In *Overstreet* v. *North Shore Corporation,* 318 U. S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.,* 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742, and *Fitzgerald Co.* v. *Pedersen,* 324 U. S. 720, the Act was held applicable to employees engaged in the maintenance and repair of interstate instrumentalities because their work is "so intimately related to interstate commerce 'as to be in practice and legal contemplation a part of it' ". *Overstreet,* 318 U. S. at 128 and 130; *Pedersen,* 318 U. S. 740, and 324 U. S. at 724–725. In reaching the conclusion that such repair work was interstate commerce this Court applied the principle—first announced in *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 567 that: " 'It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce'. And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations." The "practical considerations" underlying this ruling are that the repair and maintenance workers are "vital to the proper functioning of these structures as instrumentalities of interstate commerce" (*Overstreet,* 318 U. S. at 128, 130) "because without their service these

instrumentalities would not be open to the passage of goods and persons across the state lines" (*ibid.*).

The "practical considerations" in the instant case plainly do not warrant an arbitrary distinction between "on-the-road" and "off-the-road" employees, where the functions of both groups, as the district court found, are "all component parts of an integrated unit" (R. 14). As this Court pointed out in one of its earliest decisions under this Act (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 520), "there is no mechanical rule or 'dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce.'" Thus the courts below correctly refused to apply petitioner's rigid formula, resting their decisions instead upon consideration of the practical relationship of the employees' work to the interstate commerce.

The preparation and hauling of materials and road mixes needed for specific road repairs are just as "indispensable" and "vital" to the proper functioning of the instrumentalities of commerce, as the physical application of that material was held to be in the *Overstreet* case. In the instant case this is particularly true. There is ample support in the undisputed evidence for the district court's finding that the functions at petitioner's mixing plants were "all component parts of an integrated unit" (R. 14). The vital part the

mixing operation plays in the completed project is constantly recognized in petitioner's day-to-day dealings with the State. This function is considered so important as to be a matter of detailed specification in the road repair contracts (R. 51). The road mixes are ordinarily hauled to the road site immediately after production, and there is considerable interchange of duties among employees at the production plants and at the road sites. "On-the-road" employees, as well as "off-the-road" employees, use the production plants as headquarters.

The decisions of this Court and of the various courts of appeals have repeatedly held the "in commerce" coverage of the Act applicable to employees who do not physically work on the instrumentality of interstate commerce. See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, affirming the decision of the Fifth Circuit applying the "in commerce" coverage to those who "write the letters, keep the books" [off the road], as well as to those who "load and unload or drive the trucks" [on the road]. 128 F. 2d 395, 398; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706, holding an "off-the-road" rate clerk for an interstate motor carrier to be "engaged in commerce." See also *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 337 (C. A. 9) (holding the Act applicable to "white collar" workers physically removed from the instrumentality on which the

construction was being done, stating that "they have the immediacy of participancy lacking in the cook of *McLeod* v. *Threlkeld.*"); *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C. A. 2) (holding the Act applicable to estimators and draftsmen performing preparatory paper work on the instrumentality); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. A. 10) (holding covered as engaged "in commerce" employees of an electric power company 4% of whose power was used locally to operate railroad crossing signals, to charge storage batteries on a long distance telephone switchboard of the telephone company, and to light field and beacon lights and other equipment at the municipal airport); *Bennett* v. *Loftis Co.*, 167 F. 2d 286 (C. A. 4) (holding covered a watchman employed to guard the construction of a new bridge which had never carried interstate traffic and was some distance removed from the highways then being used to carry such traffic, but which when completed was to connect with roads leading to interstate highways). In the last cited case the Fourth Circuit, noting that the plan was "one single integrated project", made the following statement which is directly applicable here (167 F. 2d at 288):

> If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act. This

latter unrealistic approach was condemned by the Supreme Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

If the work here is viewed realistically as "an integrated unit," the employees mixing and hauling the materials to be applied to the roads immediately (frequently while still hot), would seem no less "intimately related to interstate commerce" or "vital to the proper functioning of these structures as instrumentalities of interstate commerce" (*Overstreet*, 318 U. S. at 128 and 130), than the employees who apply the materials to the roads. The truck drivers, at least, are squarely within the decision of this Court in *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146. That case, though decided under the Federal Employers' Liability Act, has repeatedly been recognized as authoritative on the question of the scope of the "in commerce" coverage of this Act. (*Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *McLeod* v. *Threlkeld*, 319 U. S. 391; *J. F. Fitzgerald Const. Co.* v. *Pedersen*, 324 U. S. 720; *Boutell* v. *Walling*, 327 U. S. 463.) At the time of his injury Pedersen was carrying a bolt to the Duffield Bridge in Hoboken, New Jersey, to be used by him that night or the next morning in repairing the bridge, then being used by the railroad in interstate and intrastate commerce. While walking on the James Avenue Bridge *en route* from a tool car to the Duffield Bridge, he was injured through the negligence of a fellow employee. This Court

held (229 U. S. at 152) that he could recover notwithstanding.

> The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce.

The employee transporting the repair materials to the instrumentality to be repaired is indistinguishable from the truck drivers here who carry the repair material from the plants where it is manufactured to the road sites where it is used. The integration here is even closer, for here it is stipulated (R. 28) that the material is applied to the roads "*immediately* after production" (the hot mix indeed *must* be so applied), whereas Pedersen did not intend to use the bolt to repair the Duffield Bridge until that night or the next morning. The employees engaged in mixing the materials would appear just as intimately related to

interstate commerce as the "off the road" clerical workers and the rate clerk held to be engaged "in commerce" in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, affirming 128 F. 2d 395, 398 (C. A. 5), and *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, rehearing denied 317 U. S. 706; or the "off the road" service and maintenance employees in *Boutell* v. *Walling*, 327 U. S. 463; or the back-shop railroad employees in *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515.

That Congress intended to reach employees of this type is also quite evident from the legislative debates discussed, *supra*, under Point A, pp. 20–22. Senator Minton, during the colloquy between Senators Borah and Bailey, specifically pointed out that the Supreme Court had recently held back-shop employees "to be in commerce," referring to *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515. (83 Cong. Rec. 9172, 75th Cong. 3rd Sess.) The *Virginian* case described these back-shop activities as having "such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded *as a part of them.*" 300 U. S. at 556 (emphasis supplied). The work of the mixing-plant employees in the instant case is similarly "a part of" other confessedly interstate ["on the road"] activities and therefore within the scope of the "in commerce" coverage of this Act.

Petitioner cites *McLeod* v. *Threlkeld*, 319 U. S. 491, as rejecting "the argument that the conception of 'in commerce' be extended *beyond* the employees engaged in actual work upon the transportation facilities" (Br. p. 26). The *McLeod* decision plainly has no such broad implications. In holding the Act inapplicable to a cook employed by an independent contractor to prepare meals for railroad maintenance employees, the Court obviously was not concerned with any physical remoteness of McLeod's work from the operation of the transportation facilities. McLeod, in effect, was an "on-the-road" employee since he served meals "in a cook and dining car attached to a particular gang of workmen and *running on the railroad's tracks*" (emphasis supplied); 319 U. S. at 492. The basic reason for the decision in *McLeod* was that the cook "supplies" the personal needs" only of the employees, that is, food which is "consumed apart from their work." 319 U. S. at 497. Thus it was plainly the functional, not any physical, remoteness of the cook's work from the operation of the trains, which precluded his recovery. The reasons for that decision, therefore, can have no application to employees who furnish the very material specified in the construction contract for the maintenance of the instrumentality itself. See *Boutell* v. *Walling*, 327 U. S. 463 (decided subsequent to the *McLeod* case), holding the "in commerce" cov-

erage applicable to "off-the-road" employees engaged in repairing, servicing, and maintaining motor transportation equipment.[16]

[16] Petitioner's objection to the "sweep" of the injunction (Br. p. 30) is plainly without merit. As the court of appeals pointed out (R. 70), the injunction in terms is limited to employees "engaged in interstate commerce or in the production of goods for commerce, *within the meaning of the Act*" (emphasis the Court's). Petitioner expresses alarm that this may include employees whose duties may be confined to the 15% of its work not shown to be related to interstate commerce. The district court correctly found on the facts before it that all of petitioner's employees come within the Act. It was stipulated that there was no segregation between petitioner's employees, either on or off the road, as to the type of project to which their work related (R. 27–28), and admittedly petitioner's business was overwhelmingly on interstate instrumentalities. It was, therefore, entirely appropriate for the district court to infer that all of petitioner's employees regularly spent substantial time on the 85% of petitioner's work which was concerned with the repair and maintenance of interstate instrumentalities, in the absence of any evidence whatsoever that any employee at any time confined his work exclusively to the "local" projects. *Guess* v. *Montague*, 140 F. 2d 500, 504 (C. A. 4); see also *National Labor Relations Bd.* v. *Van Deusen*, 138 F. 2d 893, 894 (C. A. 2). Each, therefore, is entitled to the benefits of the Act on the principle that a substantial portion of his duties are within its coverage. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. Even if it were necessary for the opinions of the courts below to discuss hypothetical situations having no basis in the facts before them, as petitioner's argument assumes, the opinions below are not deficient in this, for each points out the typical situation in petitioner's industry in which the Act (and, hence, the identically worded injunction) has no application (R. 13, 70).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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